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HYDROELECTRIC PROJECT LICENSING/STATE WATER LAW

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON THE

CONSIDERATION OF APPLICABLE WATER LAW DURING THE FEDERAL ENERGY REGULATORY COMMISSION'S HYDROELECTRIC LICENSING PROCEEDINGS

SEPTEMBER 12, 1986

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HYDROELECTRIC PROJECT LICENSING/STATE WATER LAW

FRIDAY, SEPTEMBER 12, 1986

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m. in room SD–366, Dirksen Senate Office Building, the Hon. Frank H. Murkowski, presiding.

Present: Senators Murkowski, Ford, and Melcher.

Also present: Russell R. Brown, professional staff member; and William B. Conway, counsel for the minority.

OPENING STATEMENT OF HON. FRANK H. MURKOWSKI, A U.S. SENATOR FROM THE STATE OF ALASKA

Senator MURKOWSKI. Good morning ladies and gentlemen.

We will call to order the Committee on Energy and Natural Resources. This morning we are about to embark on the oversight hearing on the consideration of applicable water law during the Federal Energy Regulatory Commission's hydroelectric licensing proceeding.

The chairman of the committee, Senator McClure, is of course vitally interested in the subject of today's hearing. Unfortunately, he is not with us.

Without objection, the statement by the Senator will be included in the record at this time.

[The prepared statement of Senator McClure follows:]

OPENING STATEMENT

SENATOR JAMES A. McCLURE

SEPTEMBER 12, 1986

Good morning. The hearing this morning before the Senate Commitee on Energy and Natural resources is to take testimony on the consideration by the Federal Energy Regulatory Commission of applicable water law during the Commission's hydroelectric licensing proceedings.

As all of you know, during consideration of S. 426 the hydroelectric relicensing bill on the floor of the Senate earlier this year, Senator Baucus and I concluded that today's hearing would be an appropriate step in tring to resolve some of the concerns expressed by various States regarding the FERC process and the licensing of hydroelectric projects.

I know that I do not need to tell any of you, whether you are a State or a Federal witness, of the crucial nature of water resources in all of our States. I would repeat, all of our States. Too often, my colleagues, and perhaps I as well, have focused solely on western water problems. That is understandable in light of my own background and the simple fact that because of scarcity - most attention is focused on the West. But as demonstrated by our witness list today, and the inquiries

received by the Committee regarding this hearing, we are addressing an issue of national importance.

The Congress of the United States decades ago determined that it was in the national interest that the water resources within the United states should be controlled by the states and allocated by them to citizens in the manner that could best be used to benefit the states and the nation. The Congress,in passing the Federal Power Act, also called for the systematic and rational development of the Nation's hydroelectric power resources with licensing authority vested in the then Federal Power Commission, now the Federal Energy Regulatory Commission.

It was inevitable that conflict would result:

-conflict as a result of the interpretation of the law.

-conflict as a result of the manner in which the law is being implemented.

Hopefully, we can take the first steps today in trying to resolve the concerns of the States.

I would note for the record, and call to the attention of the witnesses, a departure on the part of the Committee from the way in which we usually proceed. Customarily, the Federal witness

appears prior to members of the public. Today the public is first and the Federal witness is last. I have done this on purpose so that the Federal witness has no choice but to listen to the public. I am looking forward to his reaction to your views.

Senator MURKOWSKI. In that regard, I would ask the witnesses if they would be willing to summarize their written statements before the Committee as their entire statement of course will appear in the record in full.

The hearing record will remain open for two weeks to allow the submission of additional materials.

As all of you know, the issue of the relationship between State water law and the licensing of hydroelectric projects by the Federal Energy Regulatory Commission is not a new one before this Committee. Conflicts have arisen from time to time as a result of both the interpretation of the Federal Power Act and the manner in which the process is carried out by the FERC.

It is my hope, and I would offer my opinion, that this hearing will have an immediate effect on that procedure. This hearing will also be a valuable step in determining whether or not amendments to the Federal Power Act are going to be needed to address State concerns.

I would note for the record that the representative of the Federal Energy Regulatory Commission appears last on the witness list. This is a departure from the customary Committee practice. The Chairman of the Committee specifically requested this so that the witness from the Federal Energy Regulatory Commission would have the opportunity to listen to other witnesses and be prepared to offer comments where appropriate.

Senator Ford, do you have an opening statement at this time?

Senator FORD. I have no opening statement. I look forward to hearing the witnesses, particularly the first one.

Senator MURKOWSKI. We would call our colleague, the Hon. Max Baucus, United States Senator, to proceed with his statement and, as chairman of the Water and Power Subcommittee I look forward to your testimony this morning and would ask that you proceed.

STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you, Mr. Chairman.

First, I commend the Committee on its procedures. I have always thought that it made more sense for the people and the people's representatives to speak first at a hearing and the Government officials to speak later on.

Senator MURKOWSKI. I would agree. If I were the Government official, I would want it that way.

Senator BAUCUS. I am very glad to see the committee following that procedure.

On the substance, Mr. Chairman, I do have a statement which I will ask be submitted for the record. Let me be very brief and get right to the point here.

Water law, as this Committee well knows, and the use of water is sacred to the country, particularly to those of us in the West. That is because we have so little of it. The average annual precipitation in many parts of my State is around 10, 12, 13, 14 inches a year. That is annual average precipitation. Washington, D.C., I think has about 40 inches a year.

The point is that most of the West, the Rocky Mountain West, desperately needs water, and water it is no exaggeration to say is the lifeblood of our existence. It is for that reason that we in the States take great pride in adjudicating water rights, adjudicating a very scarce resource in our States.

As you might guess, it is sometimes very, very controversial. It is very hard to make these decisions. It is very hard to adjudicate water rights. Sometimes the claims are not very clear, but as you can guess the passion and intensity of those who advocate their own rights in the use of water in the West are very, very strong.

So then when FERC comes in, when FERC decides that, well, it is going to upset, it is going to change a State's adjudication of a very, very scarce resource, it obviously very much upsets us in the West.

I must say, Mr. Chairman, that there probably is no easy resolution between the rights of States to adjudicate their own water rights on the one hand, and the right of FERC, a Federal agency, to grant license under certain conditions on the other. It is not an easy resolution. I do say this, that so far the line has been drawn much, much, much too far in favor of the Federal regulatory authorities at the expense of those of us in the West and in the States where we know what water needs to be used and how it should be used.

I have some amendments which I have drafted, which I will maybe offer on the Floor, but I strongly hope that this Committee, and I know the Committee will in its judgment resolve the issue much, much more—or it should be, that is, more in favor of the States so the States themselves can determine their water rights, so that FERC not only has to consider the adjudication of water rights in the State, but FERC has to respect and follow in most cases if not in all cases those States' decisions.

Now later on today you will hear from lots of other witnesses, one of whom will be Larry Fasbender, who is the Director of the Montana Department of Natural Resources. I have known Larry for years. Larry knows this issue very well. He speaks for the State. He is an extremely talented and an extremely bright individual, and I know he will make a major contribution to this Committee's hearings.

I thank the Chairman.

[The prepared statement of Senator Baucus follows:]

STATEMENT OF SENATOR MAX BAUCUS

September 12, 1986

CONSIDERATION OF APPLICABLE WATER LAW
DURING THE FERC's HYDROELECTRIC LICENSING
AND EXEMPTION PROCEEDINGS

Mr. Chairman, I want to thank you for scheduling this important oversight hearing.

During the debate of S. 426 I was prepared to offer amendments to require FERC licensees to conform to state water law. Instead I agreed to withhold my amendments to continue the discussion of this issue at today's hearing.

The current federal system for regulating and liscensing hydropower facilities was developed in the 1920's. The Federal Power Act requires that an applicant for a federal license must show FERC that it has complied with State water use laws. In addition, the original Act specified that nothing in the act shall be construed as affecting or interfering with state laws relating to control, appropriation, use, or distribution of water.

The Federal Power Act authorizes the Federal Energy Regulatory Commission (FERC) to license and regualte virtually all hydropower facilities. Yet two sections of the Act impose restrictions on the power of FERC.

Thus, Congress made it clear in the statute that the Federal Power Act did not pre-empt state water law. It was assumed that state water law was binding on federal licensees until 1946, when the Supreme Court ruled in the First Iowa case.

It meght be concluded from these sections that an applicant can proceed with licensing by showing he has complied with state law on the appropriation, diversion, and use of water for power purposes. But thats not the Supreme Court's interpretation of the provisions. In "First Iowa" the court held that while FERC may require an applicant to submit evidence of compliance, such evidence isn't necessary for federal decisions.

The Court found that Congress intended that there be a single - federal- regualtor of power generation.

First Iowa has been followed since 1946, although the Supreme Court has not had occasion to reexamine its holding in the specific context of water rights.

Section 27 of the original Federal Power Act articulated Congress' intent not to pre-empt state water law. But under the Supreme Court's current interpretation of the law, FERC is only required to consider state resource plans and the recommendations of appropriate state agencies when evaluating license applications. The Montana amendments would return the Federal Power Act to what Congress originally intended.

With the recent increase in applications for FERC licenses, there is growing concern about how new water projects could affect state resource plans and existing water rights. States' needs for effective control of water allocation has become more critical as the demand for limited water increases. In the west there is no development without water. The demand for water resources by small scale hydro developments increased after the energy crisis of the 1970's. That demand continued to grow with PURPA and federal tax incentives for renewable energy developments. For example, the number of appliations filed with FERC increased from 76 in 1979 to 1,859 in 1981. The average number of filings before 1978 was about four.

Because of the growing demand for limited water supplies, many states have developed sophisticated water management systems attuned to their specific resources and needs. Unfortunately, States' efforts to resolve complex water problems continue to be frustrated by the Court's interpretation of the Federal Power Act.

For example, in your state of Idaho Mr. Chairman, the state granted a water right to a FERC applicant that included conditions for future upstream uses. But FERC ignored the state's water right and refused to put conditions on the license. FERC completely ignored the concerns of the state of Idaho .

According to a UC Davis law review, "It was recently brought to FERC's attention that Oregon law prohibits additional hydro generation on the Rogue River without state approval. Nevertheless, FERC issued preliminary permits for three projects on this river. When Ron Corsos, FERC Director of Division of Hydropower, was confronted with this fact, his answer was 'So what, to do otherwise would let the state make

the decision as to what developments will be built, and the state is totally incompetent to do so.' [Interoffice memorandum of the Oregon Water Resources Department from Chris Wheeler to Jim Sexton (Dec 1, 1981) (on file at UC Davs Law Review Office).]

These examples demonstrate how serious the problems with FERC have become. FERC has granted hydropower licenses when no state water right has been obtained or even applied for. This is done in spite of the fact that FERC has regulations that require application for state water rights. But these regulations are ignored. How can states possibly orchestrate development of water resources when the FERC process ignores their concerns?

For FERC to assert that it is more qualified to make decisions affecting Montana and other states is ridiculous. Besides lacking an appreciation and understanding of local concerns, FERC is unable to monitor the projects it licenses. So in effect, all of the decisions are made in Washington, but the impacts are felt in local communities all over the country.

These examples also reveal why Congress must act. Administrative changes by FERC will not solve the problem. FERC has shown little inclination to give greater consideration to the concerns and laws of the States, and litigation would be time consuming, expensive, and the outcome would be uncertain.

The Montana amendments would require FERC licensees to obtain water rights under state laws and state procedures, and would prevent situations where FERC licensees might deprive a rancher or other water user, either upstream or downstream, of his established water rights.

Today we have asked FERC and a number of states to testify on the agency's role in hydroelectric licensing. I hope that the testimony will show the problems States are experiencing with FERC's current policies, and move us closer to devising a system under which state concerns are properly considered before licences are granted.

Senator MURKOWSKI. Thank you, Senator. I being from the West happen to agree with you, as well, on some of the aspects you——

Senator FORD. You have so much water in Alaska you could give them some.

Senator MURKOWSKI. Well, that is true but we cannot use it either because as you know everything in Alaska belongs to everybody else except Alaska, so we have to have permission.

Senator FORD. Oh, I have heard that song before. I have heard that song before. [Laughter.]

Senator MURKOWSKI. Well, that is true, but hopefully one of these days you will believe it.

Senator Ford.

Senator FORD. Senator Baucus, you indicated you had some amendments. Will they follow the recommendations of the Western Water Council?

Senator BAUCUS. They will, yes.

Senator FORD. So we will get those next.

Senator BAUCUS. That is right.

Senator FORD. That is all I have.

Senator MURKOWSKI. Thank you. We wish you a good day, Senator Baucus.

Senator BAUCUS. Thank you.

Senator MURKOWSKI. We would call panel No. 1. Mr. Craig Bell, executive director, Western States Water Council, Salt Lake City, Utah; and Mr. A. Kenneth Dunn, director of the Idaho Department of Water Resources, and former chairman of the Interstate Conference on Water Policy.

Hopefully the young lady will match your names with the appropriate faces, and you may proceed as you so wish.

Mr. Bell, you are first on my list, but that does not make any difference.

STATEMENT OF CRAIG BELL, EXECUTIVE DIRECTOR, WESTERN STATES WATER COUNCIL

Mr. BELL. I will proceed, Mr. Chairman. Thank you very much for this opportunity. I appreciate Senator Baucus' comments about the importance of water in the West, and certainly there is no more vital issue as far as we are concerned.

We have long been interested in this particular issue of the overlapping authority between the FERC licensing authority and the authority of the State water administrators to grant water rights.

Senator MURKOWSKI. I think it is going to be necessary, Mr. Bell, that you pull the microphone a little closer.

Mr. BELL. Sure.

Senator MURKOWSKI. There you go.

Please proceed.

Mr. BELL. Okay. Thank you.

The Western States Water Council adopted a position in April of 1983 which addresses this issue. It describes the background of traditional congressional deference to State water law, and then describes the interpretation by the courts and by FERC, and then goes on to describe State concerns about this issue.

My purpose today is to reaffirm that the Council's position adopted in 1983 continues to be the position of the Western States relative to this issue.

In summary, that position makes the following points: Consistent with the tradition of congressional deference to State law regarding allocation of water rights, the Federal Power Act contains provisions which disclaim any effect on State law relative to the allocation, control, and distribution of water. However, those provisions have been very narrowly interpreted by the Supreme Court and by the Federal Energy Regulatory Commission such that FERC now takes the position that its licensing decisions take precedence regardless of State law.

Secondly, although FERC requires various exhibits to be filed with a preliminary permit application, it requires no proof of the applicant's ability to obtain a right for the water necessary for the proposed development. Thus, a FERC applicant can obtain FERC encouragement and approval to pursue development of a hydro site without any possibility that it can obtain a water right under State law necessary for that development.

The experience in some States is that water rights, if applied for at all, are only sought after a license or exemption is granted by FERC. In many cases, consultation of the Fish and Wildlife Coordination Act has resulted in the imposition of minimum in-stream flow requirements by FERC largely in disregard of State law. Under such circumstances, the State has a motivation to enforce those minimum in-stream flow requirements since there has been no compliance with State law, and there has been no mutually agreeable policy by which those flows might be protected. It is questionable whether FERC is in a position to be the enforcing entity with respect to those requirements.

Related to the issue of in-stream flows, FERC does not consider nonfishery in-stream uses such as asthetics, recreation, water quality, navigation and its in-stream flow determinations. In some States these aspects must be considered as a matter of State law. The State cannot ignore them, and yet the State agencies recommendations which are based on these considerations are not accommodated in FERC determinations, and therefore the result can be the imposition of two different minimum in-stream flow requirements, one by FERC and one by the State agency.

Another concern which we will talk more about today is that the imposition of minimum in-stream flow requirements as a condition in a FERC license can essentially foreclose any further upstream uses and development in disregard and in derrogation of State water plans and decisions.

As today's statements will demonstrate, these problems continue to be real. They exist and need to be addressed. The Council position calls for legislative amendments to the Federal Power Act designed to assure that FERC will not license hydropower projects until the applicant has obtained the necessary water rights pursuant to State law.

The proposed amendments would also prohibit FERC from authorizing hydro licensees to acquire water rights by use of the Federal power of eminent domain while permitting the use of State eminent domain power by an applicant otherwise authorized.

In addition, the amendments would explicitly disclaim any intent to confer water rights on the Federal Government pursuant to FERC hydro licensing procedures, and would prohibit FERC from imposing terms and conditions related to minimum flows in a license which are inconsistent with State law.

We believe the proposed amendments to the Federal Power Act would alleviate the State concerns that are illustrated today and which will be further outlined in the other statements. There would be no issuance of a FERC license or exemption unless the permittee had acquired the necessary water rights pursuant to state law. In-stream flow appropriations would also have to be made in accordance to State law and pursuant to State water planning decisions.

The final point to consider, I submit, is that the Western States because of their long history of having to balance competing interests in the water resources of their States are uniquely qualified to make determinations with respect to the allocation of water rights. FERC is simply not in a position to do that. Yet the agency in its licensing procedures, as will be demonstrated today, seems intent on disregarding State law.

Requiring compliance with State water rights would not only protect Western States' systems of water law, but also would assist FERC by assuring that those applicants that come before it are serious enough about pursuing a development that they will have complied with State procedures with respect to water law.

We therefore urge the Congress to adopt the Council's recommendations, and we appreciate this opportunity to present our recommendations. We would be happy to answer any questions.

[The prepared statement of Mr. Bell follows:]

STATEMENT
by
THE WESTERN STATES WATER COUNCIL
on
PROPOSED AMENDMENTS TO THE FEDERAL POWER ACT
submitted to the
Senate Energy and Natural Resources Committee
on September 12, 1986

The Western States Water Council is an organization of fifteen western states whose members are appointed and serve at the pleasure of their respective western governors. The Council has a vital interest in implementation of the Federal Power Act and its impact on western states management of their limited water resources. We therefore appreciate this opportunity to participate at this hearing.

On April 22, 1983, the Western States Water Council adopted unanimously a position statement concerning Federal Energy Regulatory Commission licensing and state water rights. A copy of this statement is included for the record.

The Council's position describes the background of traditional Congressional deference to western states in the allocation of water rights, and discusses the Federal Power Act and its interpretation by the courts, as well as by the Federal Energy Regulatory Commission. The position then describes state concerns relative to the overlapping nature of the authority of FERC licensing of hydro plants, and that of state water administrators to grant the water rights necessary to turn turbines in those plants. The Council's position concludes with recommendations for changes in the Federal Power Act and in FERC procedures to address these concerns.

My purpose today is to reaffirm that the position statement adopted by the Council in 1983 continues to be the Council's position relative to this matter. In summary, the Council's position makes the following points:

1. Consistent with the tradition of Congressional deference to state law regarding allocation of water resources, the Federal Power Act contains provisions disclaiming any effect on state law relating to the control appropriation or distribution of water. However, these provisions have been narrowly interpreted by the Supreme Court and by FERC, such that FERC takes the position that its licensing decisions take precedence regardless of state appropriative water laws.

2. Although FERC requires various exhibits to be filed with preliminary permit applications, it requires no proof of the applicant's ability to obtain a right for the water necessary for the proposed development. Thus, a FERC applicant can obtain FERC approval and encouragement to pursue development of a hydro site, without any possibility that it can obtain a right under state law to use the water essential for the development.

The experience of some states is that water rights, if applied for at all, are generally only sought after the applicant has received a FERC license or exemption.

3. In many cases consultation under the Fish and Wildlife Coordination Act has resulted in the imposition by FERC of minimum instream flows below a hydro development site, usually in disregard of state law. Under such circumstances, the state has little motivation to enforce the minimum flows since their has been no compliance with state law nor a mutually agreeable policy for the protection of the flows. It is further questionable whether FERC is in a position to act as an enforcing entity.

4. Related to the issue of instream flows, FERC does not consider non-fishery instream uses, such as aesthetics, recreation, navigation, and water quality, in determining instream flow requirements. In some states, these aspects must be considered as a matter of state law. Yet the water resource agency recommendations, based on its legally mandated, multifaceted considerations, have not been respected by FERC. The result may be the establishment of two minimum flow requirements, one by the state and the other in the exemption or license issued by FERC.

5. Another concern related to the imposition of minimum instream flows occurs when FERC imposes conditions which essentially foreclose upstream uses in disregard or in derogation of state water plans and decisions.

As the other statements submitted today for the record by individual western states will demonstrate, these problems continue to exist and should be addressed.

The Council position calls for legislative amendments to the Federal Power Act designed to assure that FERC will not license hydro power projects unless the applicant has obtained necessary water rights under state law. The proposed amendments would also prohibit FERC from authorizing hydro licensees to acquire water rights by use of the federal power of eminent domain, while permitting the use of state eminent domain law by an applicant otherwise authorized. In addition, the amendments would

explicitly disclaim any intent to confer water rights on the United States in the course of implementing the Federal Power Act and would prohibit FERC from imposing terms and conditions in licenses which are inconsistent with state law.

We believe the proposed amendments to the Federal Power Act would alleviate the state concerns which I have described and which will be further outlined in the statements today. There would be no issuance of FERC licenses or exemptions unless the permittee had acquired necessary state water rights. Instream flow appropriations would also have to be made in accordance to state law and pursuant to state water planning decisions.

The final point to consider is that the western states, due to their many years of experience in balancing competing interests in the use of water, are uniquely qualified to continue to have primary responsibility to allocate water rights. FERC is in no position to assume this responsibility. Yet the agency, in its licensing procedures, seems intent on disregarding state water law. Requiring compliance with state water right laws would not only protect the western state systems of water law, but would assist FERC by assuring that the applicants before it are serious enough about developing a hydro site to have complied with state water laws and procedures.

We therefore urge the Congress to adopt the Council's proposed amendments. Thank you for this opportunity, and I would be happy to answer any questions at this time.

POSITION
of the
WESTERN STATES WATER COUNCIL
Concerning
FEDERAL ENERGY REGULATORY COMMISSION LICENSING
and
STATE WATER RIGHTS
April 22, 1983

I. BACKGROUND

Federal law, specifically the Federal Power Act, requires the Federal Energy Regulatory Commission (FERC) to license any hydroelectric plant which: (1) is located on federal land; or (2) uses water impounded by a federal dam; or (3) is located in or uses water from a navigable stream or (4) produces power which affects interstate commerce. The terms "navigability" and "interstate commerce" have been broadly interpreted such that the vast majority of hydroelectric developments require compliance with FERC licensing or exemption procedures.

Because hydropower is generated by the flow of water, the right to use the water for the purpose of generating power must be obtained. This means that, in the western United States, where the doctrine of prior appropriation governs water rights, a hydro developer must obtain an appropriative water right.

Under the appropriation doctrine water is declared the property of the state or public. The essence of the creation of an appropriative water right is application of the water to a legislatively defined beneficial use. The right, allowing continued beneficial use, is then protected against subsequent appropriations. Application of this principle promotes stability of existing economies predicated upon water use and insures maximum beneficial use as defined by the public.

Congress and the Supreme Court have approved the implementation of the appropriation doctrine by the western states. Through congressional action, western land was "severed" from western water and traditional (prior appropriative) western methods of allocating and administering water rights were approved. Although the United States Supreme Court has noted recently that congressional deference to state water law has not amounted to total relinquishment of federal authority, more often than not, Congress has included a statement of specific deference to state law in significant congressional acts affecting water resources.

Such is the case with the Federal Power Act. Section 9 of the Act requires applicants to provide evidence of compliance with state water law. Section 27 states that nothing in the Act is to affect state law relating to the control, appropriation or distribution of water. However, these provisions were interpreted narrowly by the Supreme Court in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946). In

that case the Court held that FERC's predecessor, the Federal Power Commission, could license a project even though the licensee was in violation of Iowa laws requiring a state permit to build a dam and prohibiting the dewatering of a river. The Court interpreted Section 27 as referring primarily to proprietary rights created under state law. Section 27 was later construed in Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954) as assuring just compensation to holders of state created water rights if those rights were taken as an incident to the exercise of a FPC (FERC) license.

Cases following First Iowa have approved construction of FPC or FERC licensed projects regardless of conflict with state laws. These cases, however, have dealt primarily with permitting procedures other than those used to create appropriative water rights. See City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958); state statutes prohibiting dams interfering with navigation and prohibiting cities from condemning state property: Federal Power Commission v. State of Oregon, 349 U.S. 435 (1955); state statute requiring a dam permit from the state fish commission: State of Washington Department of Fish and Game v. Federal Power Commission,207 F2d 391 (9th Cir. 1953); state statutes pertaining to fishery protection. Also, it should be noted, First Iowa was not really a "water rights" case, because the applicant had acquired 98% of the riparian water rights necessary to develop the project.

In a recent case, Town of Smithfield, Vermont v. State of Vermont Environmental Board, 521 F.Supp. 243 (D.Vt. 1981), Vermont statutes requiring a land use permit for highway relocation and recreational development were found not controlling in the face of FERC licensing approval. But, the Court was careful to state that the case did not involve "control, appropriation, use or distribution of water," thereby distinguishing it from California v. United States, 438 U.S. 645 (1978). In that case the Supreme Court interpreted Section 8 of the Reclamation Act of 1902, which is nearly identical to Section 27 of the Federal Power Act, to mean that a state may impose any condition on the control, appropriation, use or distribution of water in a federal reclamation project that is not inconsistent with "clear congressional directives." The Court specifically disavowed language to the contrary in earlier opinions. Thus, new life was given the same words the First Iowa Court had restrictively construed. Although, ultimately, the California holding may or may not have direct application to construction of the Federal Power Act, at least one federal court has felt the need to distinguish it from a Federal Power Act case. While before California, it may have appeared settled that FERC licensing decisions would take precedence regardless of state appropriative water laws, the issue is now unclear.

Development of hydropower projects began early in this century. However, in the last few years, there has been a tremendous increase in hydro development. Reasons for this increase include:(1) the "energy crisis;" (2) a section in the 1978 National Energy Act which, in effect, forces electric utilities to buy

electricity at what amounts to a "premium price" from any small supplier with power to sell and (3) a section of the 1980 Crude Oil Windfall Profit Tax Act which created an investment tax credit for small hydro development. These incentives have caused the number of preliminary applications filed with FERC to increase from 36 in 1978 to approximately 600 in 1980 to approximately 1800 in 1981. The average number of filings per year before 1978 was approximately 4. The dramatic increase has led some experts to note that many claims are being filed solely to tie up hydro sites for speculation and claim jumping purposes. Regardless of the motive, the increase in filings has illuminated a number of concerns. These concerns relate to the overlapping nature of the authority of FERC to license hydro plants, and that of state water administrators, to grant the water rights necessary to turn turbines in those plants. The following will describe these concerns in detail.

II. STATE CONCERNS

A. Water Rights and Order of Application

Although FERC requires various exhibits to be filed with preliminary permit applications, it requires no proof of an applicant's ability to obtain a right for the water necessary for the proposed development. Other factors relating to the development being equal, the first potential developer to obtain a preliminary permit will be awarded the FERC license. Thus a FERC applicant can obtain FERC approval and encouragement to pursue development of a hydro site, without any possibility that it can obtain a right under state law to use the water essential for the development.

The following situation demonstrates this problem. American Falls Reservoir District No. 2 and the Bigwood Canal Company own and operate the Milner-Gooding Canal in Lincoln County, Idaho. Located on the canal is the Dietrich drop-site. American Falls and Bigwood intended to develop a hydro project at the site and obtained a hydropower water right from the state of Idaho with a priority date of September 15, 1980. On May 25, 1982, FERC granted a preliminary permit to develop the site to Idaho Renewable Resources, Inc. and the City of Ashton, Idaho. In its license order FERC concluded that there were not significant substantiated differences in the plans for development presented by the parties. Idaho law provides that, with regard to man-made irrigation facilities, water cannot be appropriated for hydropower development without the permission of the owner of the facilities.

The FERC order issuing the preliminary permit to Idaho Renewable Resources, Inc. and City of Ashton, Idaho results in one party having the FERC approval to develop the site while another party, which was in competition with the first for the FERC license, is the only entity which can obtain the necessary water right under state law. Idaho regards the FERC action as being in blatant disregard of state water law.

This concern is not limited to the state of Idaho. The state of Montana estimates that proposed development of approximately 75 projects in Montana are at various stages of the FERC review procedure, while very few of the developers have applied for state water use permits. In Washington over 500 new hydroelectric projects are under some stage of consideration with very little consultation with the state water resource management agencies regarding existing water rights, instream flows, water availability or state water policies for streams proposed for development. The experience of the state has been that water rights, if applied for at all, are generally only sought after the applicant has received a FERC license or exemption. The state of Colorado has experienced similar problems, as has the state of Utah.

After experiencing many of the same difficulties, the state of Oregon sent correspondence to Kenneth Plumb, FERC Secretary, requesting that FERC advise Oregon hydropower applicants that they contact the Oregon Water Resources Department concerning state water right requirements for hydroelectric projects. The state reports that receipt of the letter was never acknowledged and that, to its knowledge, FERC has never advised any applicants of the state requirements.

B. Imposition of Minimum Instream Flow

Under the provisions of the Fish and Wildlife Coordination Act, FERC consults fish, wildlife and parks agencies when considering issuance of a federal license or exemption for the development of a hydropower project. The western states report that in many instances this consultation leads to the imposition of minimum instream flows below a hydro development site, usually in disregard of state law. A case from the state of Montana illustrates the problem.

After consultation with pertinent agencies, FERC awarded a hydropower exemption for development of the proposed Vermillion Creek hydropower diversion project in western Montana. The project would divert water through a penstock for several miles to a lower point of return on the creek. The exemption awarded by FERC stipulated that the project could be constructed and operated only if 75 cfs were maintained below the point of diversion. Montana submits that FERC has allocated the 75 cfs minimum instream flow without prior consideration of Montana's water management responsibilities set forth under state law.

Under Montana water law, the reservation process provides the only means for the legal establishment of instream flow rights. The right to maintain these instream flows can be obtained only by a governmental entity. Without their legal protection, Montana must continue to allocate water for consumptive use in the reach stipulated by FERC for maintenance of instream flows. No water right has been sought for the Vermillion Creek project. Regardless of whether further allocations occur on the Creek, Montana questions who is responsible for assuring maintenance

of the 75 cfs flow required by FERC. The state has little motivation to enforce the minimum flow since there has been no compliance with state law nor mutually agreeable policy for protection of the flows. It is questionable whether FERC is in a position to act as an enforcing entity.

The state of Idaho has also experienced difficulty with FERC's establishment of minimum flows. Idaho, like Montana, is not adverse to the concept of minimum flows for fish and other uses, and has specific statutory procedures by which such flows can be established. However, Idaho has met with little success when it has attempted to describe to FERC the provisions of Idaho law relating to instream flows, and the problems created by FERC's lack of compliance with those provisions. The state has received no acknowledgement of its written communications, no acknowledgement of the problem and no cooperation in seeking a resolution.

The state of Texas has had similar problems with the establishment of minimum instream flows by FERC. As part of its requirements for the 50-year renewal of the FERC (FPC) license of the Possum Kingdom Dam on the Brazos River in Texas, FERC disregarded state law and the wishes of state citizens and attempted to establish minimum instream flows below the dam. Although it now appears that the problem has been satisfactorily resolved, the resolution was reached only after expenditures of a tremendous amount of time and money by the state and its citizens.

The state of Washington, with vast hydro development, has experienced different problems relating to instream flows. According to its experience, FERC does not consider nonfishery instream uses, such as aesthetics, recreation, navigation, and water quality, in determining instream flow reservations. These aspects must be considered by the Washington Department of Ecology under state law. Yet the state water resource agency's recommendations, based upon its legally mandated, multifacited considerations, are not respected by FERC. This may result in the establishment of two minimum flow requirements; one by the state of Washington and the other in the exemption or license issued by FERC. In addition to the inherent conflict of the "competing" requirements are questions of enforcement of the minimum flow requirements.

C. Foreclosure of Upstream Uses

Another concern related to the imposition of minimum instream flow occurs where applicants have acquired a state water right permit for a hydro site after receiving necessary FERC approval. Since many state statutory schemes require that, when water is available, a requested provisional permit must be issued to an applicant, a hydro developer could call for the entire unappropriated flow in a water course. This would effectively preclude future agricultural, municipal and other consumptive uses above a hydropower project. Where FERC licensing decisions are made without consulting state water use plans, considerable conflicts can occur. The Noxon Rapids Hydroelectric project in western Montana is a prime example of this problem. It has virtually

closed to future diversionary use the entire Clark Fork of the Columbia River above the dam.

D. Lack of Cooperation

Although it has been alluded to, it should be mentioned here that many of the states report that, in attempting to resolve problem situations, they have experienced a tremendous lack of cooperation by FERC. This concern relates not to arguments over what should or should not be done to resolve a given dispute, but rather to what the states perceive to be FERC's refusal to acknowledge that disputes exist. Oregon notes that its primary criticisms of FERC involve not only FERC's disregard for state water law and policy but, "a lack of cooperation with our department, (and) a failure to respond to our (written) inquiries and requests ..."

Washington also reports FERC's failure to consult with the state water resources management agency regarding basic concepts which are inherent in licensing procedures. Idaho has similar concerns. Idaho reports that written communications to FERC describing problems have not been acknowledged or answered.

Individual states have experienced problems in addition to those explained above. No attempt will be made to detail these. It should be understood, however, that the concerns which have been emphasized are illustrative of state problems; the information is not exhaustive.

III. WESTERN STATES WATER COUNCIL ACTION

In January, 1982, the Western States Water Council wrote to FERC Commissioner Georgianna Sheldon requesting that FERC regulations be amended to require that all applicants for preliminary permits and licenses for hydropower development present evidence of: (1) having filed for necessary water rights pursuant to state law, or (2) the ability to acquire the necessary water rights pursuant to state law of eminent domain or related law. (Copy attached.) Commissioner Sheldon responded by defending the current FERC regulatory scheme. (Copy attached.)

In April, 1982, the Council voted to support legislative amendments to the Federal Power Act designed to insure that FERC will not license hydropower projects unless the applicant has obtained or can demonstrate the ability to obtain necessary water rights under state law. The proposed amendments would also prohibit FERC from authorizing hydro licensees to acquire water rights by use of the federal power of eminent domain, while permitting the use of state eminent domain law by an applicant otherwise authorized. In addition, the amendments would explicitly disclaim any intent to confer water rights on the United States in the course of implementing the Federal Power Act and would prohibit FERC from imposing terms and conditions in licenses which are inconsistent with state law.

The proposed amendments to the Federal Power Act (copy attached) would alleviate most of the state concerns described above. There would be no issuance of FERC permits, licenses or exemptions unless the permittee could prove the ability to acquire necessary state water rights. Instream flow appropriations would also have to be made in accordance with state law and pursuant to state water planning decisions.

IV. CONCLUSION

The western states submit that their many years of experience in balancing competing interests in the use of water make them best qualified to continue to have primary legal responsibility to allocate water rights. FERC is in no position to assume this responsibility. Yet FERC, in its licensing procedures, seems intent on disregarding state water law. Requiring compliance with state water right laws would not only protect the western state systems of water law, but would assist FERC by assuring that the applicants before it are serious enough about developing a hydro site to have complied with state water right laws and procedures.

Given the tremendous increase in FERC filings during the last two or three years, and the "lagtime" in the FERC licensing procedure, only the "tip of the iceberg" has surfaced with regard to potential conflicts between FERC and the water administrators of the prior appropriation states. The concerns listed above will not vanish. Some sort of resolution will occur. Prudence dictates a resolution which allows all parties to carry out their traditional and legally mandated responsibilities.

In this regard, language from the most recent decision in United States v. California, is instructive. The Supreme Court remanded the case to the district court for determination of which of the conditions placed on the federal project by the State of California could be upheld. The district court decision was appealed to the Ninth Circuit which, in upholding all of the California conditions, stated:

> There is a preference, in interstate water cases, for "negotiation," "mutual accommodation and agreement," rather than litigation [citations omitted]. A similar preference applied in cases where we are asked to arbitrate complicated and delicate questions of federalism.
>
> In legal terms, these principles require the United States, at a minimum, to attempt to reconcile its interests with California law before a court can override the state's position as conflicting with federal policy. The precepts of federalism, if followed, should produce mutual respect and accommodation for state interests... The United States may not justify its demands simply as a raw exercise of superior authority. United States v. California, Nos. 81-4139x and 81-4309x (9th Cir. 1982) Slip Opinion at 11.

The experience of the western states has been that, with regard to the relationship between federal hydropower licensing and state law governing water resources, only a change in direction from past policies and procedures will produce "mutual respect and accommodation for state interests." For this reason, the Council offers its proposed Federal Power Act amendments.

WESTERN STATES WATER COUNCIL

220 South 2nd East / Suite 200 Salt Lake City, Utah 84111 Phone (801) 521-2800

January 18, 1982

Ms. Georgiana Sheldon, Commissioner
Federal Energy Regulatory Commission
825 North Capitol Street, N.E. - Room 9000
Washington, D.C. 20426

Dear Ms. Sheldon:

The Western States Water Council requests that Federal Energy Regulatory Commission (FERC) regulations be amended to require that all applicants for preliminary permits and licenses for hydropower development present evidence of:

(1) having filed for necessary water rights pursuant to state law, or

(2) the ability to acquire the necessary water rights pursuant to state law of eminent domain or related law.

Experience in our member states has shown that such a regulation is essential. In some cases, applicants for preliminary permits have been unaware that the FERC licensing process ultimately requires compliance with state water law. Other applicants have proceeded with FERC applications in deliberate disregard to state water rights ruling. In other cases, a state agency has granted a water right to one applicant while FERC has granted a preliminary permit to another applicant. These circumstances cause confusion and needless expenditure of time and money by applicants, state agencies, and commission staff. All these problems can be relieved by requiring FERC applicants to file for state water rights before filing with FERC.

While the proposed change in FERC regulations will not resolve all conflicts between state water rights and FERC licensing process, it would be an important first step. Therefore, we urge that such a provision be adopted as soon as practicable.

Thank you for considering our view.

Sincerely yours,

Charles E. Nemir
Chairman

cc: Mr. Kenneth Plumb, Secretary, FERC

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON 20426

FEB 16 1982

Mr. Charles E. Nemir
Chairman
Western States Water Council
220 South 2nd East
Suite 200
Salt Lake City, Utah 84111

Dear Mr. Nemir:

Thank you for your letter of January 18, 1982 setting forth the Western States Water Council's recommended revisions of Federal Energy Regulatory Commission regulations. Specifically, you suggest that applicants for preliminary permits or licenses under Part I of the Federal Power Act be required to present evidence of: (1) having filed for necessary water rights pursuant to state law; or (2) the ability to acquire the necessary water rights pursuant to state law of eminent domain or related law.

There are no requirements in the Commission's regulations governing the contents of an application for preliminary permit (see, 18 C.F.R. §4.81 (1981)) that address the acquisition of water rights. Inasmuch as a preliminary permit only authorizes a permittee to conduct feasibility studies to determine whether or not an application for license should be filed and to take steps to make itself a qualified applicant, any requirement obliging that applicant to investigate the availability of water rights prior to the issuance of a permit would be premature.

The Commission's regulations currently require that any application for license contain a statement of "[t]he statutory or regulatory requirements of the state(s) in which the project is located and that affect the project as proposed with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes ... [and the] steps which the applicant has taken, or plans to take, to comply' with each of the [state] laws cited ..." 18 C.F.R. §§4.41(a)(5), 4.5(a)(5), 4.61(a)(6), as amended 46 F.R. 55926 (Nov. 13, 1981) and 46 FR. 55944 (Nov. 13, 1981). This requirement should serve to focus a license applicant's attention on its ability to acquire water rights under relevant state procedures. Of course, an applicant may, if it wishes, file for necessary water rights prior to filing its application for license. It would not, however, be appropriate to require such action of license applicants prior to the issuance of a license, because there is, at

that time, no assurance that the applicant will ultimately receive a license authorizing development of the proposed project. Furthermore, there are frequently competing applicants for a license, and thus the Commission must, pursuant to its statutory responsibilities, determine which of the competing applicants, if any, will receive a license. If all competitors were directed to file for water rights in advance of the Commission's decision, state agencies would be needlessly burdened with competitive water rights adjudications, with no assurance that the party who is granted the water rights under state law will ultimately receive the federal license required to develop the proposed hydroelectric project.

It may be that a great deal of the difficulties state agencies have experienced are related to the dramatic increase in the number of applications for preliminary permit that have been filed during the past two years. Inasmuch as the issuance of a permit is a preliminary action which authorizes feasibility studies but not the construction of a hydropower development, state agencies may wish to consider deferring action on water rights applications by such permittees until feasibility studies have been completed and the Commission has rendered a final decision by issuing a license to a specified applicant.

If I may of any further assistance to the Council or any of the individual state agencies in facilitating a coordination of our mutual responsibilities with respect to water resource development, please feel free to contact me.

Sincerely,

Georgiana Sheldon
Commissioner

POSITION
of the
WESTERN STATES WATER COUNCIL
concerning
AMENDMENT OF THE FEDERAL POWER ACT
Las Vegas, Nevada
April 16, 1982

WHEREAS, needless controversy has been caused by conflicts between the licensing procedures of the Federal Energy Regulatory Commission (FERC) and established principles of Western States water law; and

WHEREAS, FERC has been unwilling to modify its procedures to relieve these conflicts:

NOW, THEREFORE, BE IT RESOLVED by the Western States Water Council that the Federal Power Act (16 U.S.C. 791(a) et seq.) be amended as follows:

1. Strike from subsection 9(b) the following language "...and to the appropriation, diversion, and use of water for power purposes..." Add the following new subsection after subsection (c):
"(d) Notwithstanding any other provisions of law, the commission is prohibited from issuing an original or new license, amendment to license, or exemption from licensing under this Part, unless the applicant proves acquisition, in accordance with applicable substantive and procedural provisions of state law, of the necessary rights established pursuant to state law to appropriate, divert, and use water for power purposes."

2. To Section 21 add the following new sentence:

"The commission is not empowered to authorize a licensee to exercise the right of eminent domain pursuant to this section for the purpose of acquiring water rights."

3. In Section 27 designate the existing sentence as subsection (a) and add the following additional subsections:

"(b) Nothing in this Part shall be construed as conferring upon the United States, its agents, permittees, or licensees any right to acquire rights to appropriate, divert, or use water.

(c) Appropriation of water for power purposes subject to this Part shall be pursuant to substantive and procedural provisions of State statutory law, decisional law, and regulations governing appropriation, diversion and use of water.

(d) Establishment of, and compliance with, pursuant to State law, terms or conditions, including licenses, or other entitlements for appropriation, diversion or use of water for power purposes, shall not be deemed to constitute a burden on interstate commerce.

(e) Nothing in this Part shall alter in any way any provision of State statutory law, decisional law, or regulation, or of any interstate compact, governing the appropriation, diversion, or use of water."

4. To Section 6 add the following provision after the second sentence:

"The commission is not empowered to impose any terms or conditions in any original or new license or amendment to license which are inconsistent with the terms and conditions established pursuant to State law in any permit, license, or other entitlement for appropriation, diversion, or use of water for the project authorized by the license or amendment."

Senator MURKOWSKI. Thank you very much, Mr. Bell.

Do you have any suggestions with regard to changes you would like to see in the FERC procedure under the area you have outlined for us?

Mr. BELL. We have a couple of suggestions which we communicated early on to FERC. Namely, we suggested that as a condition for the granting of a preliminary permit that there be evidence presented of having filed for necessary water rights pursuant to State law, or evidence that they have the ability to acquire the necessary water rights pursuant top State law of eminent domain or related law.

FERC presently has no such requirement. We suggested that this would really be a step in the right direction and could address many of our concerns.

We received an answer to that suggestion by FERC. They declined our recommendations. Therefore, we felt it was necessary under the law to change the Federal Power Act if we were going to address our concerns.

Senator MURKOWSKI. The question has come up before the Committee from time to time on the adequacy of the notification. I am wondering if you have any comments on that.

Mr. BELL. That was one of the——

Senator MURKOWSKI. The procedure internally of notification by FERC. Do you feel it is adequate, inadequate, could it be improved?

Mr. BELL. There have been several concerns expressed among our membership that the notification procedures are not adequate.

Senator MURKOWSKI. Not adequate?

Mr. BELL. They are not adequate. They do not give States adequate notification in time to address the concerns that they have within the framework of FERC procedures.

There has also frankly been a lot of dissatisfaction with FERC cooperation in general. It has not been good. It has been much less than satisfactory. When the State has attempted to make its concerns known to FERC, they have essentially been ignored and disregarded in large part. Because of FERC's supreme position under the law, we have the impression that they do not feel it is necessary to accommodate the State; therefore, there has been little incentive to do so on the part of the Federal Energy Regulatory Commission.

Senator MURKOWSKI. Well, I think that is something that we certainly can improve.

Tell me with regard to the experience of State government working with the Federal Government and State agencies. Do you find conflicts as to the recommendations to the FERC licensee in the process of issuing these licenses?

Mr. BELL. Yes. Yes, and sometimes there are conflicts between what the——

Senator MURKOWSKI. Is it just between the States and the Federal Government? Or does it go beyond that?

Mr. BELL. It involves the applicant, as well. There are conflicts with respect to what the applicant would like to do and State government, as well. That is one of the problems that we would like to address through our recommendations. The applicant can essentially circumvent State laws and plans through this FERC procedure.

Senator MURKOWSKI. Senator Ford?

Senator FORD. I do not believe I have any additional questions. You are the executive director of the Western States Water Council. How many States?

Mr. BELL. There are 15 States associated with the Council.

Senator FORD. Do any border the Mississippi River?

Mr. BELL. Pardon?

Senator FORD. Do any States border the Mississippi River?

Mr. BELL. No.

Senator FORD. They are all west of that?

Mr. BELL. Yes.

Senator FORD. Is California involved?

Mr. BELL. California? Yes. Virtually all of the Reclamation States.

Senator FORD. Thank you, Mr. Chairman.

Senator MURKOWSKI. That is where the troublemakers are, then, West?

Senator FORD. Well, some have water and will not let others that need it have it. I have always heard that all my life. So California dams up all the water so Nevada cannot get it. I have heard that for 50 years, too. When they gave the land to the veterans out West and they put a little water to it and somehow they got it and it made it right good land to grow right good crops on, I was right amazed at the fertility of the land after water got to it.

Senator MURKOWSKI. Thank you.

Senator Melcher.

Senator MELCHER. Well, I suspect you agree with section 27 of the FPA that "nothing herein contained shall be construed as affecting nor intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses," which is everything.

Mr. BELL. That is right.

Senator MELCHER. I suspect you agree with that. Is that what you think is a primary problem right now?

Mr. BELL. Yes, sir. And I do like the language itself. I do not like the way it has been interpreted by the Supreme Court in First Iowa essentially to mean only that if State water rights are taken in the process of this FERC hydrolicensing procedure then just compensation must be afforded. That is really the only role that that section has been given, according to the Supreme Court.

Senator MELCHER. And also section 9B of the FPA that says "satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be okayed or with respect to bed and bags and to the appropriation, diversion, and use of water for power purposes," which I am also taking from the FERC testimony. "You agree with that.

Is your principal interest that despite hell or high water FERC keeps those two paragraphs in mind?

Mr. BELL. Yes. I think they are important paragraphs. They needed to be strengthened, in my opinion.

Senator MELCHER. They need to be strengthened?

Mr. BELL. Yes.

Senator MELCHER. All right. But is it your feeling that FERC is not paying attention to those two paragraphs as much as they should?

Mr. BELL. It is my feeling that they are going according to the Supreme Court's very narrow interpretation of those two paragraphs. They have authority for their position. That is why we recommend that it is necessary to change the law, because the Supreme Court has narrowly interpreted these provisions and FERC has authority for essentially its very narrow interpretation of those two provisions you cited, Senator.

Senator MELCHER. They also have authority to interpret them as we read them, too, do they not?

Mr. BELL. I would hope so. I would hope so.

Senator MELCHER. I think they do. But I agree with you that since the 1946 court case it is long overdue that we clarify that those two sections are adhered to by FERC so that there is no mincing around.

Mr. BELL. Yes, sir.

Senator MELCHER. Thank you.

Senator MURKOWSKI. Mr. Dunn, we look forward to your statement. Please proceed.

STATEMENT OF A. KENNETH DUNN, DIRECTOR, IDAHO DEPARTMENT OF WATER RESOURCES, AND ON BEHALF OF THE INTERSTATE CONFERENCE ON WATER POLICY

Mr. DUNN. Mr. Chairman, Members of the Committee, thank you.

I am Kenneth Dunn. I am representing the State of Idaho and, in addition, the Interstate Conference on Water Policy. I am a past president of that association.

Mr. Chairman, to summarize briefly, the Federal Energy Regulatory Commission is currently issuing licenses for hydro projects that are in a total disregard for State water law. They provide for the development of hydro facilities not only without recognizing the State water law, but in conflict with State water law.

Senator MURKOWSKI. Excuse me, Mr. Dunn. I am going to have to interrupt.

I have an Intelligence Committee meeting that has been called, and Senator Ford has very graciously agreed to chair until 11 o'clock. So if you would excuse me, Senator Ford has followed the hearing obviously.

Senator FORD. This is the story of our life up here, Mr. Dunn. You go right ahead. I do not need that.

Senator MURKOWSKI. This gavel is almost wearing out from being passed. [Laughter.]

Senator FORD. Well, we will get it permanently in January, so that is all right. [Laughter.]

Senator MURKOWSKI. Do not hold your breath.

Senator FORD [presiding]. I will not.

Go right ahead.

Mr. DUNN. Thank you, Mr. Chairman.

I have for a number of years requested that the Federal Energy Regulatory Commission recognize State law in their process, and

have asked that when a preliminary permit is being issued that the applicant be required to have applied for a State water right.

Their response to that has been, well, they cannot do that, but they will take care of it at the licensing time. When licensing comes along, they issue the license without regard to the water right. I have presently in Idaho a decision from the Federal Energy Regulatory Commission regarding a hydro project on the Payette River near Horshoe Bend in the same county, or adjacent county to the one that Chairman McClure is from. Keeping in mind that FERC believes that they are the best suited to make the decisions on the Payette River, even though I suspect none of them know where Horsehoe Bend is, and I would imagine that the word "Payette 'may mean a small paycheck to somebody instead of the Payette River having some meaning, and yet these same people believe that they have an overriding interest in making decisions on the management of that river, irrespective of the needs of State water law.

In that project, I requested that the license contain a provision for subordination for future use of the water upstream from the project. That is entirely consistent with State water law.

If I might, Mr. Chairman, I am going to read very briefly the conditions I asked for. That is:

> The project shall be operated in such a manner as will not conflict with the future depletion and flow of the waters of the Payette River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the back water created by the project, as needed for upstream development in the public interest.

And "in the public interest" is important because the State of Idaho makes a detailed evaluation of public interest need when we utilize the subordination clause.

Well, FERC under the First Iowa decision refused to include that as a licensing provision, and in effect now we would have a hydroelectric system relatively low on the river that would have under Federal licensing provisions the use of all of the waters of the Payette River to the exclusion of future upstream industrial, municipal, commercial, or irrigation uses. That, Mr. Chairman, flies directly in the face of State law.

We feel that hydropower by its nature, by being able to construct a hydro facility on a river should not preclude the economic development of a system. FERC has refused to include that in their license. The end result will be when somebody wants to develop, Boise Cascade Corporation, a licensee, will be in direct conflict with the State of Idaho and, as a result, the Federal Government because of that Federal license. Because I will, if it is in the public interest, issue water rights for further depletions of that river, because that is the way the State has determined it wants to manage its water resources.

Mr. Chairman, we have asked for that kind of a statement to be included in a license. It has been refused. I believe and I hope that Congress can strengthen the requirement that the Federal Energy Regulatory Commission comply with State law and avoid the conflicts that are going to continue to exist between the States and the Federal Government and ease our need to constantly intervene in the licensing process for a hydroelectric project, most of which, the

majority of which have very little if any national Federal significance.

Thank you, Mr. Chairman.

[The prepared statements of Mr. Dunn follow:]

TESTIMONY OF
A. KENNETH DUNN, DIRECTOR
IDAHO DEPARTMENT OF WATER RESOURCES

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON ENERGY AND NATURAL RESOURCES

HEARINGS OF FEDERAL ENERGY REGULATORY COMMISSION
HYDROELECTRIC LICENSING PROCEEDINGS
RELATING TO STATE WATER LAW
WASHINGTON, D.C.
SEPTEMBER 12, 1986

Mr. Chairman, Honorable Members of the Committee:

Thank you for calling this hearing to take testimony realitive to state water law in the licensing proceedings of the Federal Energy Regulatory Commission.

I am Kenneth Dunn, Director of the Idaho Department of Water Resources. I have the statutory duty to supervise the management and use of the waters of the State of Idaho. The Department of Water Resources under my supervision also provides the staff support for the Idaho Water Resource Board. The "Board" is the constitutional agency designated to set policy for the full utilization of Idaho's water.

The Constitution of the State of Idaho provides that the waters of the state are subject to the regulation and control of the state. The Idaho Department of Water Resources is that agency in state government designated to supervise the appropriation and allotment of the waters of the state, and I am the designated Director of that agency.

Mr. Chairman, Idaho has, as have most states in this great country, taken seriously the management of water resources. We have in the recent past improved our ability to conserve and fully utilize the limited fresh water resources of our states. The demands on our water resources are increasing, while the supply remains constant. Conflicts in the past over water seemed, and indeed have been serious; however, conflicts in the very near future will make us wish for the "good old days".

Management of water resources is not unique in its principle. Effective management requires that the manager have some degree of control over those things he is managing. The present system of licensing hydroelectric projects by the Federal Energy Regulatory Commission without care, regard or understanding of state water rights, removes the necessary control required for me to effectively manage the water of my state as I am charged to do by state law.

I have for a number of years requested the Federal Energy Regulatory Commission recognize state water law in their process of issuing hydroelectric plant licenses. When a preliminary permit is being issued, I have been told that it does nothing but provide the applicant the opportunity to determine if a feasible project exists, while reserving a priority filing for the applicant, and that the water right issue can be taken care of at licensing. When the license is issued, I am told that conditioning the license to comply with state water law would give the state control over management of the

water and indirectly the project; therefore, requests for licensing conditions to meet state water law requirements are denied. That Mr. Chairman transfers management of state water to the Federal Energy Regulatory Commission. I do not know what Congress intended when it passed the Federal Power Act, but I do not believe it intended to transfer to the Federal Energy Regulatory Commission control of water within individual states.

Certainly more recent Congress' have shown that management and control of water rests with the states, and you have required your agencies to comply with conditions of state water law. It only seems consistent and logical that an entity obtaining a license from a federal agency meet those same conditions.

Mr. Chairman, to bring this issue to focus, allow me to discuss a specific Federal Energy Regulatory Commission license that was issued for a project in Idaho. The license is in the name of Boise Cascade Corporation for the Horseshoe Bend Hydroelectric Project, on the Payette River, Idaho.

Mr. Chairman, I am going to ask you to keep in mind that the Federal Energy Regulatory Commission, believes they are better suited to control the use of the Payette River for the Horseshoe Bend Project than the state. This, inspite of the fact, that unlike you they wouldn't recognize Horseshoe Bend if I took them there, and the word "Payette" would probably be thought of as a small pay check.

I requested that in issuing a license to Boise Cascade Corporation a condition be inserted into the license for subordination to future upstream development. I specifically requested the inclusions of the following provision:

> The project shall be operated in such a manner as will not conflict with the future depletion and flow of the waters of the Payette River and its tributaries, or prevent or interfere with the future upstream diversion and use of such water above the back water created by the project, as needed for upstream development in the public interest.

This provision was rejected as not being consistent with Congress' intent in enacting the Federal Power Act and its interpretation by the courts in a 1946 case referred to as First Iowa.

An integral part of Idaho water regulation has been the subordination of water rights for power purposes to protect the public interest from restrictions on all future development. Under the appropriation doctrine prevalent in the western states, an unsubordinated hydropower water right may prevent any junior priority upstream water diversion which would diminish the flow of water at the project. The hydropower project could prevent new consumptive uses of water for residential, commercial and institutional uses as well as industrial, agricultural and environmental projects. This would result in the licensee of the project, rather than the state, having the ultimate control over the future appropriation, use and distribution of all water upstream from the project. This license would place control of the future water

supply for the cities of McCall, Cascade, Donnelly and all other uses in most of Valley County in the grasps of the Federal Energy Regulatory Commission and Boise Cascade Corporation. To avoid such violations of the public trust, most of the major hydropower projects constructed in Idaho during the last thirty years have been issued subordinated water rights by the State of Idaho.

The Federal Energy Regulatory Commission's order issuing the license for this project, and not providing for future upstream consumptive water uses on the river over the fifty year term of the license is not in the public interest, and inconsistent with Idaho law. Yet the Federal Energy Regulatory Commission concluded the project "would be best adapted to the comprehensive development of the Payette River Basin". The precluding of economic development in the river basin upstream from the project, is a serious infringement upon state sovereignty, and highlights the reasoning of the Idaho's subordination law.

Section 27 of the Federal Power Act, (Act), mandates that the control, appropriation, use, or distribution of water by the respective states is unaffected by the Act. Despite the existence of the congressional mandate saving the states' traditional jurisdiction over their water resources, the Federal Energy Regulatory Commission refuses to give meaningful recognition to the role of state water law. The implication is that the operation of licensed projects takes

complete precedence over state water law because state water law may affect to some degree the manner in which a project is operated. Consequently, I had sought inclusion of water right subordination language in the project license to avoid litigation over the establishment of future water rights.

Mr. Chairman, there remain a few instances in the federal system which fail to recognize the intent of Congress as it has expressed itself many times, which is, the control of the waters of the states remains with the states. The Federal Power Act is one of these instances. While we can continue to intervene in all of the hydropower licensing actions and file briefs before the Federal Energy Regulatory Commission and the courts, please spare us of this burden. Protect the right of the states to manage their water resources by amending the Federal Power Act. Remove the inviting opportunity for misinterpretation by zealot bureaucrats to seize control of state waters.

Mr. Chairman and Members of the Committee, I request you to continue with the actions you have taken in the past to make reason out of the Federal Power Act keeping it consistent with federal law, such as the Flood Control Act of 1944, 53 Stat. 888, wherein you defer to state water law: "it is the 'policy of the Congress to recognize the interests and rights of the States in determining the development of watersheds within their borders and likewise their interests and rights in water utilization and control.'" Also Mr. Chairman, in the

Senate Report on the McCarran Amendment, 43 U.S.C. §666(a), which subjects the United States to state-court jurisdiction for general stream adjudications the Senate provided:

> In the arid Western states, for more than 80 years the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the state in which it is found, which State is vested with the primary control thereof.
>
> Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the state, if there is to be a proper administration of the water law as it has developed over the years." S. Rep. No. 755. 82nd Cong., 1st Sess., 3,6 (1951).

Mr. Chairman and Committee Members, I believe and hope you concur that the control and management of water resources should remain within the jurisdiction of the states. The state government is best able to determine the use of water that will meet the needs of the citizens it represents. Recognizing water supply differences throughout regions of our country, the states are able to apply specific individual management provisions rather than utilize national regulations which probably are not applicable. We cannot afford the expense resulting from continual conflict with the Federal Energy Regulatory Commission. The solution falls to this Committee of Congress to amend the Federal Power Act so that the intent of Congress is clear. Mr. Chairman, I offer the assistance of my staff in assisting the Committee in drafting the needed amendments to the Federal Power Act.

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Thank you for your attention, interest and early resolution to this important problem.

TESTIMONY
OF
THE INTERSTATE CONFERENCE ON WATER POLICY

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON ENERGY AND NATURAL RESOURCES

HEARINGS ON THE EFFECT OF FERC
LICENSING PROCEDURES ON STATE WATER
LAW AND RESOURCE PLANNING
September 12, 1986
Washington, D.C.

Presented by
A. Kenneth Dunn
ICWP Past-Chairman
and
Director of Idaho Department of Water Resources

955 L'Enfant Plaza, S.W.
6th Floor
Washington D.C. 20024

Mr. Chairman and Honorable Members of the Committee:

I am Kenneth Dunn, Director of the Idaho Department of Water Resources. In addition to appearing before the Committee on behalf of the State of Idaho, I am pleased to present the testimony of the Interstate Conference on Water Policy (ICWP) in my capacity as Past-Chairman of that organization. ICWP appreciates the opportunity to provide comments on the effects of the Federal Energy Regulatory Commission's hydropower licensing procedures on state water law and resource planning and thanks the Committee for calling this hearing.

The Interstate Conference on Water Policy (ICWP) is the independent national association of state, interstate, and regional water administrators concerned with water quantity and quality management, conservation, and development. Since 1959, ICWP has been the voice for state water management concerns, particularly with regard to the relationship between state and federal programs, regulatory authority, and information exchange. ICWP is firmly committed to building and maintaining a strong and viable federal-state partnership in water resource management. It is precisely because of ICWP's dedication to this partnership philosophy that the organization and its individual members are so deeply concerned about federal intrusion into the sovereign responsibilities of the states.

The Federal Power Act requires the Federal Energy Regulatory Commission (FERC) to license any hydroelectric power facility which: a) is located on federal land, (b) uses water impounded by a federal dam, (c) is located on or uses water from a navigable stream, or (d) produces power which affects interstate commerce. These provisions have been so broadly interpreted that most hydropower developments fall within FERC's licensing authority.

The Federal Power Act was originally intended to bring a comprehensive regional perspective to bear in the evaluation of hydropower projects. Thus, authority for licensing was vested in an arm of the federal government, thereby broadening what may have been viewed then as the strictly parochial perspectives embodied in narrowly focused state or local regulations. However, the situation today is vastly changed. No longer is the federal government viewed as the bastion of comprehensive water management. Indeed, states have dramatically broadened both their perspective and water management efforts. State water plans now encompass a broad spectrum of quality and quantity concerns including water supply, flood control, recreation, water quality, fish and wildlife, navigation, and energy production. Today states and interstate or regional water management agencies are in a better position to balance competing interests and judge hydroelectric development plans in the context of total state and regional water resource needs. While there is an unquestionable national interest in power production and its regulation, the exercise of federal authority need not and should not be inconsistent with state and interstate water management plans.

In yet another perhaps more onerous way, the original intent of the Federal Power Act has changed. The Federal Power Act was originally crafted in full recognition of state authority with regard to control, appropriation, and distribution of water. However, the Act is no longer administered in deference to state water law. Judicial and administrative actions have narrowly interpreted the provisions of the Federal Power Act, jeopardizing the states' ability to exercise their sovereignity over state waters.

Hydropower siting and licensing decisions are currently being made by the Federal Energy Regulatory Commission (FERC) with blatant disregard for state water law. Under current law, FERC can grant a permit for development of a hydropower project to a party which has not obtained a state water right. Indeed a license can be granted for a project on a river which has been fully

adjudicated among current users, thus forcing those users to relinquish their rights. This situation is not merely the result of a lack of coordination or cooperation between state and federal agencies, but amounts to a federally prescribed pre-emption of state authority.

FERC licensing procedures may also frustrate states' water management and regulatory responsibilities by imposing conditions on the permit or license in disregard of state law. In some cases, state law is circumvented by failure to consider state-mandated instream uses when imposing minimum instream flows below the dam. In other cases, FERC actions totally disregard the state reservation process including the legal enforcement means.

These examples of how the Federal Power Act serves to obviate state water law are not merely hypothetical illustrations. Many states have encountered very real and fundamental conflicts with federal hydropower licensing of projects. Many of ICWP's member states intend to submit testimony directly to the Committee based on their experiences. In particular, the States of Idaho, Montana, Washington, Oregon, Colorado, Utah, Texas, and Oklahoma have all encountered similar problems.

The concern over pre-emption of state water law and management responsibility is certainly not peculiar to the western states which operate under the appropriation doctrine. States throughout the nation have sovereign authority over state waters and have been vested with responsibility for its use, conservation, and development. States, such as Pennsylvania, which own and operate dams have had FERC permits issued to private developers at those sites in complete disregard of the rights of the state as proprietor. States, such as Oklahoma, have found their state-designated scenic rivers threatened by hydropower impoundments sanctioned by FERC despite state law protecting those rivers. States, such as Arkansas, are finding their plans to provide water for irrigation jeopardized by potential hydropower development authorized by FERC.

In short, the implications of the federal disregard of state water law in hydropower licensing are widespread and pervasive. State water law, as well as state water planning and management efforts, can and have been thwarted by FERC hydropower licensing actions across the country. States in different parts of this nation face very different sorts of water concerns and have evolved state water management approaches and legal frameworks uniquely suited to their needs. However, states share a very fundamental concern about federal actions which fail to recognize state law and state water management responsibilities.

As a matter of policy, ICWP is committed to actively work for the modification of existing and proposed federal legislation, regulations, or policies that would lessen the role of the States or infringe upon established states' rights to allocate and manage water resources. Specifically, ICWP opposes federal hydropower licensing procedures which attempt to pre-empt state water management and allocation laws.

States should not be required to intervene, often at substantial cost and significant effort, in FERC licensing procedures simply to protect their sovereignty over state waters. Rather, federal law should be constructed to explicitly require deference to state water law and management responsibilities. ICWP believes that its position on this issue is consistent wtih the general views and policy position of the Western States Water Council. ICWP encourages the Committee to support amendment of the Federal Power Act to restore balance of federal and state interests and protect the states' fundamental sovereignty over their waters.

Senator FORD. Thank you, Mr. Dunn.

At what stage of the licensing procedure and what agencies in your State would FERC notify in the licensing procedure?

Mr. DUNN. They notify my agency, the Department of Water Resources, the Fish and Game Department, and the Department of Health and Welfare, that I am aware of. We do get notice. We get bunches of those notices. With the size of our staff, it is very difficult to continue to respond, because most of our response has to be through intervention, which requires a substantial legal effort on our part that we would like to avoid.

Senator FORD. At what stage of the licensing procedure are you notified?

Mr. DUNN. At the preliminary permit stage. That is where we begin the process of intervention.

Senator FORD. What about preliminary permits? You are on board then at the beginning? When they start with a preliminary permit, you are notified?

Mr. DUNN. Yes, Mr. Chairman, I am notified by receiving the application in the mail, but that does not get the applicant in to file a water right. The situations we are creating within my State and other States is one individual goes to FERC for a preliminary permit, he is granted a preliminary permit to begin the study of installing a hydroelectric facility.

Other individuals come to the State for the water right and establish a date of priority under State law, and now the question is who develops that facility. Does the person who went to the Federal Government? Or does the person who came to the State to get the water right?

We are in direct conflict at that point because FERC does not say "go to the State government and get your water right on file and establish a priority date at the same time you come to us."

We tell the water right applicant that that is what he has to do, go to FERC. But they, for whatever reason, feel that that is not within their authority to tell somebody they have to file for a water right.

Senator FORD. What you are telling us then, Mr. Dunn, is the licensee must have in hand the ownership of the water before the license is granted, or earlier?

Mr. DUNN. Mr. Chairman, I am saying that at the preliminary permit stage he should have at least filed for a State water right. Then at the time the Federal license is issued, there should be some coordination and agreement that the State water right and the Federal license can be issued concurrently, or we are at least in agreement we are going to issue them.

Now I have and do issue my permit conditioned upon their obtaining a Federal license. I think that is appropriate. If they do not get the license, then my permit is voided. If the Federal Government is not going to coordinate, then we create our own problems because I may have the wrong person being first in line for a water right.

Senator FORD. You have fogged me just a little bit. That is not hard to do, by the way. But do you ever issue duplicate ownership of water?

Mr. DUNN. Not for a hydroelectric project, no, sir.

Senator FORD. Well, could you issue a duplicate right to see which one works out, or is it which one comes first?

Mr. DUNN. No. For a hydro project we would only issue one. That would be to the first applicant who could meet all the conditions of that permit.

Senator FORD. What if there were several preliminary filings for the same site?

Mr. DUNN. It would be the first one to walk in our door would establish the earliest date of priority. I would then go through the process of handling that application, and when I was ready to issue the permit I would put conditions that that applicant would have to meet. If he can meet those conditions, he gets the permit. If he cannot meet those conditions, it would go to the next person. But it is "first in time is first in line."

Senator Ford: But you do not know which one is going to win it from FERC.

Mr. DUNN. That is correct.

Senator FORD. I do not think your procedure is much better than FERC's, to be very frank with you.

Mr. DUNN. And that is where my problem is. I will be issuing it to the first person who comes in my door with a filing who can meet all of the State conditions, and FERC may well and probably will have a different applicant being issued the preliminary permit.

Now if those two proceed, I will have to under State law defend that water right applicant in court. We are going to waste a lot of taxpayers' money banging heads between the State and the Federal Energy Regulatory Commission as to who gets the water.

Senator FORD. We have the same kind of problem in Kentucky. We have more navigable streams than any State in the Nation. We have a lot of water, and we have people running all over the place filing for the same thing, and we have run into a problem.

It seems to me, when I was Governor I liked to get these things off my back and blame Big Brother up here for it, you know. You have taken a little different tack. You leave me with the impression, Mr. Dunn—and I am going to have to think this one through and, as the Chairman said earlier. There will be some questions that will probably be submitted to all of you in writing and we would ask for you to get them in and to expedite the answers—but it seems to me that when you issue a permit, or before FERC issues a permit, you want that individual or that company that came into your office to own that water before FERC issues the permit, the permanent permit.

Tell me about the Swan Falls project on the Snake River.

Mr. DUNN. Well, Mr. Chairman——

Senator FORD. That is one that kind of works both ways, as I understand it.

Mr. DUNN. That is correct, Mr. Chairman. That was a major water issue in our State. It took us two years to resolve it. We have resolved it. The end result is that the Idaho Power Company which had the water rights at Swan Falls agreed to allow part of its water to be subordinated to be used by upstream later developers.

Senator FORD. Has FERC ruled on that petition?

Mr. DUNN. No, sir. We asked them some 18 months ago for a decision to modify the license. The power company agrees to the

modification. The State of Idaho agrees to the modification. We have asked FERC for a decision. We have now gone about 18 months, maybe two years, with no response. The last response I heard of was the staff said they had to refer it to the Commission because it was something they could not rule on.

It is a black box up there. You do not get those decisions out of FERC.

Senator FORD. Well, you received a decision on the Horsehoe Bend Hydroelectric Project, did you not?

Mr. DUNN. Yes, the applicant did, but we have not gotten the decision to modify that existing license. And the decision we got out of Horsehoe Bend ignored virtually the same clause that we asked for on Swan Falls. That is, a subordination clause. They said that that would give the State control over the river, and I agree with them. We should have control over that river.

Senator FORD. I am going to save some of these questions, if I have time, and I apologize for taking so long, for FERC.

It seems to me, and I may be all off because it is a different situation and I have knowledge of different types of water problems, but once I am issued a license I should not have to worry about water being diverted, because I have entered into a contract to build a hydroelectric operation.

I then have committed myself to the energy generated, and then all of a sudden you divert it on me and I cannot meet my contract. It is subordinated.

Mr. DUNN. Well, Mr. Chairman——

Senator FORD. So I get around to the possibility that maybe the license should not have been given in the beginning. We have gone through days and days and days of water problems, and water hearings, and legislation as it relates to the West. I have said several times that I wish this Administration would find out there is a part of this country east of the Mississippi River. We do have a few problems here, but it is very difficult to get anybody to listen to us. Maybe one of these days that will change, but we do have some problems and FERC has to deal with us too, just like they have to deal with you.

We have to write a law that applies to everybody as equally as possible, and when we paint up here we paint with a broad brush and it does not fit every individual case. I understand some of the water problems, but I also have heard that you have so much water in Idaho that you do not know what to do with it all sometimes. You do have flooding out in Idaho.

Mr. DUNN. Yes, Mr. Chairman, we have marginal flooding compared to what you have in the States east of the Mississippi. We agree, I agree and ICWP agrees that there are problems with the eastern States with FERC, and you will have received some written testimony from some of those States.

The problems are different, however, than they are in some of the western States, and that is why we say that FERC ought to issue that license in concert with State water law, not in conflict with it. Once that happens, I think you avoid some of the problems between one State and another State.

As to the subordination to the future upstream use of water, the reason for that is a small hydroelectric system low on a river could

preclude all development in a State, and that may not be in the interest of the people of that State. That is why our law says that we allow that future diversion if it is in the public interest.

Now in arriving at that, we have to look at the effects of those depletions on that existing hydro project. Some use of that water may be well justified as opposed to precluding all future development in a river basin.

Senator FORD. Things are beginning to bounce up here for me, and I apologize. I will have some questions for both you and Mr. Bell, and I look forward to your learned answers.

Thank you, gentlemen.

Mr. DUNN. Thank you.

Mr. BELL. Thank you.

Senator FORD. Panel number two is Larry Fasbender from Billings, Montana, and Karen Massey from Augusta, Maine. We have got you two about as far away from each other as we can get you this morning. We will ask Karen to testify first.

STATEMENT OF KAREN A. MASSEY, DIRECTOR, LAND AND WATER RESOURCES COUNCIL, ON BEHALF OF THE HON. JOSEPH E. BRENNAN, GOVERNOR, STATE OF MAINE

Ms. MASSEY. Mr. Chairman, my name is Karen Massey. I am Director of the Land and Water Resources Council of the State of Maine and chair——

Senator FORD. Pull the microphone up a little closer, if you will. They forgot to turn it up this morning.

Ms. MASSEY [continuing]. And chair of the State's FERC Coordinating Committee.

I am here today to present the testimony of Governor Joseph Brennan, and I very much appreciate this opportunity to expresss Maine's concerns with the current Federal-State balance in hydropower licensing under the Federal Power Act.

Our problems and approach differ somewhat from those of our sister States which operate under a system of appropriative water rights, but we share their more general concerns with a need for greater control over our river resources than is currently accorded to the States by the Federal Energy Regulatory Commission.

This is a subject on which Maine has been very active in the past several years. In fact, two years ago almost to the day Governor Brennan submitted written testimony to the Hon. Richard L. Ottinger, Chairman of the Subcommittee on Energy, Conservation, and Power of the House Committee on Energy and Commerce in their oversight hearings on the Federal Power Act. The testimony that I have is very similar to what was presented at that time.

We have also sent letters to all members of the current Conference Committee on the Electric Consumers Protection Act of 1985, and we like the other States testifying before you feel that the pending amendments to the Federal Power Act, while addressing many important concerns, do not resolve the issue of the proper State-Federal balance in hydropower decisionmaking.

We have over 32,000 miles of river resources, and the Governor has made a concerted effort in the last six or seven years to develop comprehensive planning for all of these river resources. These

efforts culminated in the spring of 1983 with the enactment by the Maine legislature of landmark legislation entitled "An Act to Promote the Wise Use and Management of Maine's Outstanding River Resources," and a copy of that is presented with the written testimony.

We have provided special protection from new dams and harmful shoreland development for 1100 miles of 18 Maine rivers that have been identified by the U.S. Department of Interior as having natural and recreational features of national significance.

We have replaced a confusing system of laws with one-stop permitting for hydro projects, with careful consideration of environmental, technical, and public safety constraints. We have not overlooked the fact that our rivers have some national natural resource values, and have consulted with Federal officials in all of our planning activities.

As an energy-importing State, we have paid particular attention to the need for use of our rivers for hydro power. Since Governor Brennan took office, the hydro power capacity in Maine has increased by 25 percent.

We believe that the objectives of the Maine rivers' policy and our accomplishments are in accord with the national goals of the Federal Power Act, but we are concerned that these goals are not presently articulated in a clear fashion, nor are there adequate assurances that the legitimate will of Maine's people regarding the use of our rivers is given proper consideration in the decisions made at the Federal level within the bounds of the national interest.

Specifically, under present court interpretation of the Federal Power Act FERC may override the decisions that we in Maine make concerning the future of our rivers, contrary to the provisions of our balanced and carefully considered Statewide rivers policy.

We have submitted a comprehensive plan to the Federal Energy Regulatory Commission projecting the uses of Maine's rivers for hydro power and recreational and other uses up to the year 2000. While FERC has acknowledged receipt of our plan, its status in FERC proceedings remains unclear. We have been disappointed with their response to our plan and to inquiries made of the Commission by the House Subcommittee in its 1984 oversight hearings. I commend to your consideration the extensive correspondence and testimony presented by FERC in connection with those hearings.

We realize, as does the State of Montana and others here today, that there is an important and necessary role for Federal authority. We do not seek to eliminate a Federal role, but we do seek to establish a constructive partnership that recognizes the legitimate and effective role for the States in our use of our rivers.

A consistent State-Federal regulatory posture based on mutually agreeable goals will steer potential developers away from projects where they will encounter insurmountable obstacles and toward projects where the public and private interests clearly coincide. We think that is good government.

Our own preferred approach to resolving the problem is embodied in the State Comprehensive River Planning Act, S. 870, which was introduced by Senator George Mitchell of Maine, and which was attached to the written testimony. This legislation

would clarify the State's right to develop comprehensive plans for their river resources which, if approved by FERC, would be controlling in Federal hydropower licensing decisions.

The Federal consistency process established under the Coastal Zone Management Act was a model for development of this legislation. It may be that both the Mitchell legislation and amendments such as those proposed by Montana are needed to redress the current imbalance in State and Federal roles in decisionmaking.

It may be that these proposals can be broadened and combined in an effective manner. We do feel that the Montana legislation as currently drafted is too narrowly focused on western water law to respond to our concerns, but we share many of their concerns with the failure of the Federal Power Act as currently administered to give due consideration to State laws and policies on the use of State river resources.

The State of Maine has to date enjoyed a generally cordial relationship with FERC, but without a clarification of the State and Federal roles that firmly asserts the State's voice in the Federal decisionmaking process, we fear that this relationship may deteriorate into adversarial positions. We believe that legislation is necessary to address these concerns, and we urge the Committee to give due consideration to the approach in S. 870.

I would also note that at their 1983 meeting the National Governors Association endorsed an approach similar to the one proposed by Maine, concluding their resolution by stating that only in cases of overriding national interest shall FERC depart from the comprehensive State hydropower plan submitted.

We would be pleased to provide the Committee with any additional information, and to work with the other States and organizations here today to develop legislation that would accomplish all of our common goals.

[The prepared statement of Governor Brennan follows:]

STATE OF MAINE
OFFICE OF THE GOVERNOR
AUGUSTA, MAINE
04333

JOSEPH E. BRENNAN
GOVERNOR

The Honorable James A. McClure
Chairman
Committee on Energy & Natural Resources
358 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator McClure,

I very much appreciate this opportunity to express Maine's concerns with the current Federal-State balance in hydropower licensing under the Federal Power Act.

While our problems and approach differ somewhat from those of our sister States which operate under a system of appropriative water rights, we share their more general concerns with the need for greater control over river resources than is currently accorded to the States by the Federal Energy Regulatory Commission. This is a subject on which Maine has been very active in the past several years.

What I have to say here was, to a large extent, presented to the Honorable Richard L. Ottinger, Chairman of the Subcommittee on Energy Conservation and Power of the House Committee on Energy and Commerce, as written testimony for their September 7, 1984, oversight hearings on the Federal Power Act.

In addition, I have sent letters to all of the members of the Conference Committee on the Electric Consumers Protection Act of 1985, expressing the State's position on the pending amendments to the Federal Power Act, a copy of which is attached. As that correspondence indicates, we, like the other states testifying before you, feel that the pending amendments to the Federal Power Act, while addressing some important concerns, do not resolve the issue of the State/Federal balance in hydropower decisionmaking.

Maine is abundantly endowed with river resources. Throughout our history, Maine people have relied heavily upon our nearly 32,000 miles of rivers and streams as a basic resource. Rivers have served as our avenues of commerce and settlement, and as valuable resources for industrial, agricultural, and other public uses. This array of competing demands has led, at times, to conflicts over allocation of the resources. During the nineteenth century, for example, the diversion of rivers for industrial purposes resulted in sometimes violent confrontations.

By the middle of this century, however, there were few conflicts over the use of our rivers, because half a century of treating them as sewers had made many simply too dirty for other uses. But private and public efforts and the investment of hundreds of millions of dollars over the past decade have transformed Maine from the home of some of the dirtiest rivers in the nation, to the home of some of the cleanest.

Improvements in water quality, restoration of fisheries, and expanding interest in river recreation rekindled Maine people's appreciation of our rivers. Then, the national energy crisis of the mid-70s arose, hitting Maine hard, as one of the nation's most oil-dependent states. A series of proposals for new dams or the reconstruction of existing dams focused urgent public attention on the question of how best to use Maine's rivers.

It soon became clear to me that, without a strong assertion of the public role in decisionmaking about our rivers, we would squander the opportunities they offer Maine people for multiple use. Without the most careful consideration, we could easily lose their recreational benefits and natural beauty, or, just as easily, forego valuable energy resources through interminable conflicts and needless regulation.

Beginning with my State of Maine Energy Policy directive in 1981, I set in motion a series of steps toward a comprehensive Maine Rivers Policy, to ensure the wise use of Maine's rivers. These efforts culminated in the Spring of 1983 with the enactment by the Maine Legislature of a landmark statute appropriately entitled "AN ACT to Promote the Wise Use and Management of Maine's Outstanding River Resources." I attach a copy of this law for inclusion in your record.

The very essence of our Maine Rivers Policy is balance among competing uses. On the other hand, we have provided special protection from new dams and harmful shoreland development for 1,100 miles of eighteen Maine rivers, identified by the U.S. Department of the Interior as having natural and recreational features of national significance. At the same time, we have replaced a confusing system of laws requiring as many as seven different permits from four separate State agencies with a "one-stop" permitting process to expedite hydropower development under the most careful environmental, technical, and public safety constraints.

We have not overlooked the fact that Maine's rivers are a national resource, as well as an asset for Maine. Indeed, throughout the process of developing the Maine Rivers Policy, we

carefully considered with federal officials the national interest in the allocation of Maine's river resources.

As an energy importing State, historically dependent upon substantial quantities of foreign oil, we have paid particular attention to the potential of our rivers for hydropower development as an alternative to more costly and less environmentally desirable energy resources. We have permitted substantial new hydropower production since I took office, increasing our hydropower capacity by fully 25 percent.

I believe that the objectives of the Maine Rivers Policy, and our accomplishments in recent years, are in total accord with longstanding national goals embodied in the Federal Power Act. We are concerned, however, that these national goals are not presently articulated in a clear fashion; nor are there adequate assurances that the legitimate will of Maine's people regarding the use of our rivers is given proper consideration in decisions made at the federal level, within the bounds of national interest.

Specifically, we have discovered that, under present court interpretation of the Federal Power Act, FERC may override the decisions that we in Maine make concerning the future of our rivers, contrary to the provisions of our balanced and carefully-considered Maine Rivers Policy.

We have taken the initiative to clarify the federal and State roles in this decisionmaking process. We have attempted to take advantage of the FPA toward this end. In July 1982, I directed the Maine Office of Energy Resources to prepare and submit a Comprehensive Hydropower Plan to FERC as provided for in Section 10(a) of the Act.

The Office submitted this plan in October 1982, making Maine the first State to provide a comprehensive plan to FERC for guidance in the Agency's hydropower licensing decisions. Maine's plan outlines a clear strategy for the future development of over 340 MW of hydropower in Maine by the year 2000, without diminishing the special natural and recreational values of our most outstanding rivers. I attach a copy of this plan for your record.

While FERC has acknowledged receipt of our plan, its status in FERC proceedings remains unclear. We have been disappointed, however, with FERC's response both to our plan and to inquiries made of the Commission by the House Subcommittee in its 1984 oversight hearings.

We realize, as does the State of Montana in its August 15, 1986, paper on State concerns with the Federal Power Act, that there is an important and necessary role for Federal authority in hydropower permitting; and we do not seek to eliminate that federal role. Rather, we seek to establish a constructive partnership between the States and the Federal government which recognizes a legitimate and effective role for the States in the establishment of national rivers policies. Through a mutually agreed upon hydropower development plan, we are seeking to assure consistency between State and federal decisionmaking in these matters.

We believe that such a cooperative understanding will foster our mutual objective of encouraging sensible hydropower development in Maine. Our experience has shown that without clear guidance from regulatory agencies, developers waste valuable time and resources on projects which ultimately will not receive State and Federal approval. A consistent State/Federal regulatory posture, based on mutually agreeable goals, will steer potential developers away from projects where they will encounter insurmountable obstacles, and toward projects where the public and private interest clearly coincide.

We had hoped that FERC would meet out initiative with constructive proposals for its applicability under FPA Section 10(a). But as FERC Chairman Raymond J. O'Connor stated in his February 17, 1984, response to the House Subcommittee, "there is not total reliance on any single plan" in FERC's decisionmaking process; and he offered no suggestions for use of this comprehensive planning process as a means to strengthen Federal/State cooperation.

Our own preferred approach to resolving the problem of FERC's lack of responsiveness to State river policies is embodied in the "State Comprehensive River Planning Act" (S.870), introduced by Senator George Mitchell of Maine. S.870 amends the FPA to clarify the State's right to develop comprehensive plans for their river resources which, if and when approved by FERC, would be controlling in federal hydropower licensing decisions. The federal consistency process established under the federal Coastal Zone Management Act has served as the model for this proposal. A copy of this bill is attached for your record.

It may be that both the Mitchell legislation and the amendments to the FPA proposed by Montana are needed to redress the current imbalance in State and federal roles in decisionmaking affecting the use of State water resource in a way that effectively deals with differences in water law in the two States. It may be that the two can be broadened and combined in

an effective manner. We do feel that the Montana legislation as currently drafted is too narrowly focused on western law to respond to our concerns; but we share many of their concerns (as detailed in the Montana DNRC paper of 8/7/86) with the failure of the Federal Power Act as currently administered to give due consideration to State laws and policies on the use of State water resources.

The State of Maine has, to date, enjoyed a generally cordial relationship with FERC; but without clarification of the State and federal roles that firmly asserts the State's voice in the federal decisionmaking process, we fear that this relationship may deteriorate into unfortunate adversarial positions. We believe that legislation is necessary to address these concerns. We urge the Committee to give due consideration to the approach embodied in S.870. We will be pleased to provide the Committee with any additional information you may request, and to work with this Committee and with other interested States to accomplish our shared objectives.

Thank you for your attention to this important matter.

Sincerely,

Joseph E. Brennan

JOSEPH E. BRENNAN
Governor

JEB/l

Attachments

State of Maine

OFFICE OF THE GOVERNOR

AUGUSTA, MAINE 04333

July 18, 1986

The Honorable Edward J. Markey
2133 Rayburn House Office Building
Washington, DC 20515

RE: Proposed Amendments to the Federal Power Act

Dear Representative Markey,

My Administration has been following with great interest the legislative progress of the proposed amendments to the Federal Power Act, entitled the Electric Consumers Protection Act of 1985. Hydropower provides approximately 27% of the electric energy needs of the State of Maine. In addition, Maine has more hydropower projects scheduled for relicensing in the next seven years than any other state in the country. Thus, we have a great interest in ensuring that all federal licensing and relicensing decisions provide for the greatest possible benefit to the public from the use of its water resources.

Now that the House and Senate have committed their respective versions of this bill (H.R. 44 and S.426) to conference, the time seems opportune for providing you and the other Conferees with our views on the provisions of this legislation of most concern to the State of Maine.

Because the letter which follows is long, I will first summarize our positions and recommendations, which are then explained more fully below.

-- We support section 3(a) of H.R. 44 amending section 4(c) to provide for equitable treatment of all beneficial public uses of our waterways in hydropower licensing decisions.

-- We support clarification of and amendment to the comprehensive planning provisions of §10(a) of the Federal Power Act, but we find both H.R. 44 and S.426 unsatisfactory. We propose that provisions such as those appearing in S.870 (attached) be added to the conference version of the Electric Consumers Protection Act of 1985.

-- We support section 4 of S.426 limiting to 30 years the terms of licenses that do not involve major construction or redevelopment.

-- We support limiting the terms of exemptions. (See S.426, §§6 and 7.)

-- We propose that existing exemptions not be grandfathered -- delete S.426, §9 -- but that they be given a limited term, e.g. 50 years, from the date of enactment of the Electric Consumers Protection Act of 1985.

-- We propose that the Federal Power Act be amended to clarify that exemptions require State water quality certification under §401 of the Clean Water Act.

Comprehensive Plans

The State of Maine has been particularly interested in ensuring that the Federal Energy Regulatory Commission give due consideration to State-developed comprehensive plans for improving and developing the State's rivers and streams. In past contacts with FERC, the State of Maine has suggested that they adopt standards and procedures for approving comprehensive plans adopted by States and make decisions consistent with those plans in the absence of any Commission-developed plan for the river basin in question.

Maine has developed a comprehensive plan, which is designed to "strike a carefully considered and well-reasoned balance among the competing uses of the State's rivers and streams... which affords the public maximum benefit and seeks harmony rather than conflict among these uses." We submitted this plan in October, 1982, making Maine the first State to provide a comprehensive plan to FERC for guidance in its hydropower licensing decisions. Maine's comprehensive, statewide rivers plan outlines a clear strategy for the future development of over 340MW of hydropower in Maine by the year 2000, without diminishing the special natural and recreational values of our most outstanding rivers.

We believe that the objectives of the Maine Rivers Policy, and our accomplishments in recent years, are in total accord with longstanding national goals embodied in the Federal Power Act. We are concerned, however, that these national goals are not presently articulated in a clear fashion; nor are there adequate assurances that the legitimate will of Maine's people regarding the use of our rivers is given proper consideration in decisions made at the federal level, within the bounds of national interest. Specifically, under present court interpretations of the Federal Power Act, FERC may override the decisions that we in Maine make concerning the future of our rivers, contrary to the provisions of our balanced and carefully-considered Maine Rivers Policy.

The proposed amendments to the Federal Power Act make some progress toward addressing this problem, although we find neither the Senate nor the House version entirely satisfactory in this regard. More specific comments follow regarding those provisions of the respective bills that we would like to see included in the final bill.

H.R. 44: Section 3(a) proposes to amend §4(e) of the Federal Power Act to provide:

> In issuing any license under this part for any project, the Commission shall give equitable treatment with the development purposes for which the license is issued to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

We support this statement and recommend that it be included in the final version of the Electric Consumers Protection Act of 1985. The nation's rivers are a vital resource for multiple important uses. The requirement of "equitable treatment" for all of these uses accords with what we believe to be a wise and proper approach to management of our valuable water resources, and with Maine's own balancing of energy and environmental considerations in State hydropower licensing decisions.

S.426: Section 3 amends section 10(a), the comprehensive plan provision of the Federal Power Act, to clarify that in fulfilling this requirement the Commission shall consider the extent to which the project is consistent with a comprehensive plan developed by the State in which the facility is or will be located.

We support the inclusion of such language in §10(a), but believe that it does not go far enough. The Senate Report (99-161), in its section-by-section analysis of S.426, explains the importance of this section as follows:

> Section 3 amends section 10 of the EPA (sic) to express as explicit statutory language certain of FERC's existing practices under that section... By making these conditions explicit, section 3 does not impose any new duties or obligations beyond those which FERC is already subject to under existing law nor would it modify current FERC practice.

We believe that current FERC practice is not in accordance with the comprehensive plan requirements of §10(a). FERC neither prepares its own comprehensive plan, nor will it approve and rely on a State comprehensive plan, such as that submitted by the State of Maine. (See attached excerpts from FERC responses to questions submitted by Representative Richard R. Ottinger of New York). We contend that Maine's plan comports with the requirements of §10(a) and that absent a plan developed by the Commission itself, the Commission should act consistently with approved State or regional plans.

This concern is not unique to Maine. At the February 1983 meeting of the National Governors' Association, the Governors adopted the following policy position:

> The Governors recommend that the Federal Power Act and relevant FERC regulations be amended to require that all applicants for permits and licenses, or renewals thereof, for hydropower development present evidence of consistency of the proposed project with a comprehensive state or regional hydropower plan, submitted by the State or region in accordance with the Federal Power Act. Only in cases of overriding national interest shall FERC depart from the comprehensive State hydropower plans, as submitted.

S.2361, introduced by Senator George J. Mitchell of Maine in February 1984, and reintroduced in the 99th Congress as S.870, would implement the Governors' recommendations and §10(a) of the Federal Power Act. This bill not only clarifies the State's right to develop comprehensive plans (like S.426), but provides that such plans, if approved by FERC, would be controlling in Federal hydropower licensing decisions. This proposal is modelled on the federal consistency process established under the federal Coastal Zone Management Act. A copy is attached for your information.

We prefer this approach to the provision in H.R. 44 giving special powers to fish and wildlife agencies. While their concerns are very important, we would prefer to see the FERC required to defer to approved State or regional plans and decisions and conditions that consider all public benefits in an equitable fashion, giving neither power development nor fish and wildlife considerations procedence over other legitimate public concerns such as recreation, flood control, and energy conservation. Maine has developed a coordinated process giving all agencies an opportunity to comment and participate in the State decisionmaking process; we fear that this process may be undermined by giving one agency or interest a larger voice in the federal process. We urge you to add the provisions of S.870 to the Electric Consumer's Protection Act of 1985.

Terms of Licenses and Exemptions

Section 4 of S.426 confirms current FERC practice of limiting the terms of new licenses to thirty years "unless the Commission determines that a longer period is necessary due to substantial new construction or significant redevelopment of the project in question." Fifty years remains the maximum term for licenses.

Page five

We support this provision. Where there is no substantial redevelopment or reconstruction, we are talking about a relicensing. After a thirty to fifty year initial license, a thirty year relicense will take most dams to end of their useful life, and a longer term is not justified.

Secondly, as stated in House Report 99-507, pp. 11-12, quoting President Theodore Roosevelt:

> "The public must retain control of the great waterways. It is essential that any permit to obstruct them for reasons and on conditions that seem good at the moment should be subject to revision when changed conditions demand...
>
> "Provision should be made for the termination of the grant or privilege at a definite time, leaving to future generations the power or authority to review or extend the concession with the conditions which may prevail at that time."

Under this rationale, we also wholeheartedly support the limits on exemptions proposed in sections 6 and 7 of S.426. Currently there is no time limit on exemptions, which arguably extend in perpetuity. We further feel that existing exemptions should also be time-limited. Therefore, we recommend that section 9 grandfathering the "in perpetuity" status of existing exemptions be deleted. The conference committee should substitute a section providing that existing exemptions will expire on a date certain, e.g. fifty years from the date of enactment of this Act.

Water Quality Certification for Exemptions

Finally, we propose that the Federal Power Act be amended to make it clear that exemptions require State Water Quality Certification under §401 of the Clean Water Act. Maine requires such certifications, and believes that they are mandatory for hydropower applicants.

Section 401(a)(1) of the Clean Water act requires that "(a)ny applicant for a Federal license or permit to conduct any activity... which may result in any discharge into the navigable waters..." shall obtain a certification. FERC has consistently held that §401 applies to applicants for hydro project licenses. In holding such a position, FERC recognizes that the construction/operation/maintenance of a hydropower project constitutes an "activity... which may result in (a) discharge into the navigable waters," a position with which the State of Maine agrees.

However, FERC holds that §401 does not apply to applicants for hydro project exemptions. There are two important points about exemptions that must be recognized. First, a project that qualifies for an exemption is no less a hydropower project than is a project which must receive a license. Second, as FERC has itself stated "an exemption, although it removes a project from the purview of Part I of the Federal Power Act, is nonetheless a Federal authorization to construct and operate" a hydro project. Thus, an exemption appears to be a Federal authorization "to conduct (an) activity which may result in (a) discharge into the navigable waters."

It appears that the only way that FERC can hold that an applicant for exemption is not subject to §401 is to say that an "exemption" is not a "license" as referred to in §401. However, since (1) an exemption has the same effect as a license, and (2) the Energy Security Act of 1980, which authorizes FERC to grant case-by-case exemptions, does not expressly override the Clean Water Act, Section 401 appears to apply to exemptions as well as licenses (FERC's contention that exempted projects "provide environmentally clean energy" notwithstanding). The Federal Power Act needs to be clarified in this regard.

* * * * *

We are taking no position on various other matters addressed in the Electric Consumer's Protection Act of 1985, as they are of less immediate and longstanding concern to the State of Maine.

We trust that you will give these comments your fullest consideration in the Conference Committee on the Electric Consumers Protection Act of 1985. The States have a vital interest in the use of their valuable water resources and a strong desire to work in partnership with Congress and the federal agencies in assuring that uses of these resources are coordinated to obtain maximum public benefits.

Should you have any questions regarding the State's position on these matters, please contact Karen Massey, Chair of the State's FERC Coordinating Committee in the Maine State Planning Office at (207) 289-3261.

Sincerely,

Joseph E. Brennan
GOVERNOR

JEB/l
Attachment

cc: Maine Congressional Delegation

State comprehensive river planning act

Mr. MITCHELL. Mr. President, I am today introducing legislation which will enable States and the Federal Government to work together in promoting the effective utilization and sound management of river resources.

I am introducing this legislation at the request of Maine's Governor, Joseph E. Brennan, who has taken a leadership role in the development of a sound, coherent government rivers policy.

Governor Brennan's efforts began when he offered, during his first term, a series of legislative proposals which sought to provide a reasoned mechanism which State and local planners could use to chart the future of valuable waterways. The Governor's legislative proposals became State law in Maine when on June 17, 1982, he signed "An Act to Promote the Wise Use and Management of Maine's Outstanding River Resources." Included in this landmark State statute are provisions which set aside almost 1,100 miles of Maine rivers from hydropower development; streamline the State's hydropower development permitting process; protect another 700 miles of river shorelands from incompatible development, and require fish passage facilities on dams.

The successful passage of this act was not a victory for environmentalists or for proponents of increased development of hydropower. It was a victory for all of us who recognize the need for rational, balanced approach to a State's use of its river resources.

Although other States, such as Vermont, Connecticut, and Idaho, are following Maine's lead in developing mechanisms to facilitate comprehensive river planning, a major Federal obstacle stands in the way of these efforts. That obstacle is the Federal Power Act, certain provisions of which provide the Federal Energy Regulatory Commission, FERC, with authority to override State decisions made after vigorous study and extensive public involvement and debate. Governor Brennan now is directing his energy toward overcoming, in a responsible way, this serious impediment to the effective implementation of a State's rivers policy.

The National Governor's Conference, consisting of the chief executives of all 50 States has endorsed Governor Brennan's approach. It adopted the following policy position on the problem at their February, 1983 meeting:

The Governors recommend that the Federal Power Act and relevant FERC regulations be amended to require that all applicants for permits and licenses, or renewals thereof, for hydropower development present evidence of consistency of the proposed project with a comprehensive state or regional hydropower plan prepared by the state or region in accordance with the Federal Power Act. Only in cases of overriding national interest shall FERC depart from the comprehensive State hydropower plans, as submitted.

The bill I am introducing today will allow each State to prepare a comprehensive plan for its river resources, and to submit the plan to the FERC for approval. If approved by FERC, the comprehensive plan would be controlling in Federal licensing proceedings for hydropower projects in that State, similar to the Federal-State relationship that exists under section 307 of the Coastal Zone Management Act.

The bill amends title 16 of the United States Code. The specific sections which the legislation would amend are part of the Federal Power Act. The bill would require a developer to certify that his or her project complies with the FERC-approved State comprehensive plan. The State would have to concur with this certification.

The heart of the proposal is a new section 803(a) to title 16. The new section allows, but does not require, each State to develop a comprehensive plan, to be submitted to FERC for review and approval. The plan's contents have been specified in the legislation. Before approving a comprehensive plan, FERC must make certain findings. For instance, FERC would have to determine that the State has developed the plan in accordance with the rest of the act, after notice, and with the opportunity of full participation by relevant Federal agencies, State agencies, local governments and other interested public and private parties.

The bill's approach to river resource planning is conservative. It amends an existing law rather than establishing a whole new statutory structure.

It maintains Federal control, and reserves to FERC the ultimate authority to license dams, in that the Commission may disapprove a State comprehensive plan. A key point to keep in mind is that the so-called State-comprehensive plan is without effect unless approved by FERC. In other words, FERC will make the final judgment on whether a proposed State plan is compatable with the national interest. A plan which places too much of the hydro resource "off limits" can be rejected by FERC. This process is similar to that contained in the Coastal Zone Management scheme.

Under this bill, no State is required to prepare a comprehensive plan. States without approved plans will continue to be treated as FERC now treats all States. However, if a State chooses to prepare a comprehensive plan, such a plan must meet certain minimum criteria set out in the bill. A review of the criteria shows that they are designed to establish the information necessary for the State and FERC to make an informed decision about where to strike the balance between river protection and development. For example, an inventory of outstanding river stretches is required, but so too is a projection of the State's energy needs for 10 and 20 years, and an explanation as to how such needs can be met at a reasonable cost.

In many respects, this bill should be viewed as an aid to FERC. Although the existing Federal Power Act (section 10(a)) requires FERC to license dams in accordance with a "comprehensive plan," no where in the existing statute is the term "comprehensive plan" defined, and, as a result, the requirement now is largely ignored. By giving meaning to the term, this bill will encourage long-range planning, while it will discourage the current practice of licensing facilities on an ad hoc basis, dam by dam. The bill will enable FERC to look at hydropower development in a broader, more reasoned context.

Finally I wish to note that the legislation I am introducing today is similar to the process it seeks to establish. It strikes a beneficial public policy balance by allowing the States to undertake greater river resource conservation planning, and the Federal Government to retain the ultimate licensing power it must possess to preserve the integrity of important Federal environmental laws. These laws include the National Environmental Policy Act, the Fish and Wildlife Coordination Act, the Clean Water Act, and more than 20 other statutes. Such Federal authority, in my judgment, is necessary if we are to maintain the quality and use of water flowing from one State into another.

In short, this bill—which I ask unanimous consent be printed following these remarks in the Record—gives the States the greater planning role to which they are entitled, without undermining Federal authority necessary to enforce the important national environmental legislation to which I have referred.

There being no objection, the bill was ordered to be printed in the Record, as follows:

S. 2361

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "State Comprehensive River Planning Act."

Sec. 2. 16 U.S.C. 802 is amended by striking subsection (e) and inserting in lieu thereof the following new subsections:

"(e) A certification that the proposed project complies with the state's comprehensive plan, and that such activity will be conducted in a manner consistent with the plan, where the proposed project is within a state or states which have a comprehensive plan which has been approved in accordance with section 803 (a). At the same time the applicant shall furnish to the state or the designated agency a copy of the certification, with all necessary information and data. Each state shall establish procedures for public notice in the case of all such certifications and, to the extent that it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state, or its designated agency, shall notify the Commission that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the requisite

+ S.57 - 97th Congress

notification within 90 days of receipt of its copy of the applicant's certification, the state's concurrence with the the certification shall be conclusively presumed. No license or exemption shall be granted by the Commission until the State or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed.

"(d) Such additional information as the Commission may require.".

Sec. 3. 16 U.S.C. 803 is amended by striking subsection (a) and inserting in lieu thereof the following new subsection:

"STATE COMPREHENSIVE PLANS

"(a)(1) That in order to facilitate the licensing of water power projects under this Act, while at the same time according to the states their legitimate role in controlling the future of their waterways, any state may submit to the Commission for its approval a comprehensive plan allocating the use of its waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial uses, including flood control, industrial and agricultural water use, recreational, ecological, historical, commercial fishery, and esthetic purposes. Within 90 days of receipt by the Commission of a certified copy of such plan, the Commission shall approve or disapprove the plan. In order for a state comprehensive plan to be approved by the Commission, the plan shall include at a minimum:

"(A) the identification of rivers and river segments deserving special protection based upon an analysis of each river's composite recreational ecological, geologic, hydrologic, historic, commercial fishery and esthetic resource values, in at least two categories:

"(i) rivers and river segments which are of greater than statewide significance because the aforementioned values are outstanding or rare when considered in a regional or national context, and

"(ii) rivers and river segments which are of statewide significance because the aforementioned values are outstanding or rare when considered in a statewide context.

"(B) a state hydropower plan which shall include:

"(i) a description of current and projected energy supplies which may include consideration of applicable interstate energy plans,

"(ii) energy demand projections for the succeeding 10 and 20 years including the assumptions on which such projections are based,

"(iii) an analysis of the contribution new hydropower will make to the state's energy supply and the likely alternative energy sources to new hydropower,

"(iv) identification of existing and potential hydropower project sites, and

"(v) identification of possible state actions to facilitate the development of hydropower wherever appropriate.

"(C) a fisheries management plan which shall include the identification of existing and potential hydropower sites, the expected fish passage requirements necessary to support a substantial commercial or recreational fishery, and the water flows necessary to maintain and protect water habitats.

"(D) the provision that no new dams shall be built on river segments of greater than statewide significance and that additional development or redevelopment of dams existing on these segments be designed and executed in a manner that does not diminish the significant values of these river segments, and the consideration of protective measures to enhance the resource values of river segments of outstanding statewide significance.

"(E) the identification of any state actions necessary to implement the plan and a schedule for taking such actions.

"(2) That prior to granting approval of a comprehensive plan, the Commission shall find that:

"(A) the state has developed the plan in accordance with this Title, after notice and with the opportunity of full participation by relevant Federal agencies, state agencies, local governments, and other interested persons, public and private,

"(B) the state has held public hearings in the development of the comprehensive plan,

"(C) the plan and any changes thereto have been reviewed and approved by the Governor, and

"(D) the state has the authorities necessary to implement the plan.

"(3) That comprehensive plans shall be reviewed and updated at least every five years though a state may amend its plan subject to approval by the Commission at any time. Any amendment must be the subject of a public hearing conducted by the state before it may be submitted to the Commission for approval."

By Mr. JOHNSTON:

S. 2362. A bill to amend the Mineral Lands Leasing Act of 1920, and for other purposes; to the Committee on Energy and Natural Resources.

LEASING OF PUBLIC LANDS TO MERGER PARTIES

Mr. JOHNSTON. Mr. President, the bill I am introducing today is a very simple one. It reflects my concerns with the very rapid pace of mergers in the energy industry. You practically cannot pick up a newspaper, or turn on a news report, without hearing about one energy company taking over another one, or threatening to take over another one.

I am certainly not convinced that all of this merger activity is bad. But I am concerned that some very significant changes are taking place in the industry and that Congress ought to give them greater scrutiny and be assured that the long-term effects of these mergers are in the public interest.

My bill would not prohibit the mergers from taking place. Rather it would prohibit parties to a merger consummated in the next 6 months from having access to the oil and gas resources on the public lands. It would amend the Mineral Lands Leasing Act and the Outer Continental Shelf Lands Act to prohibit the Secretary of the Interior from issuing any lease or granting any right-of-way under the provisions of those acts to any party: First, who is a party to a merger consummated within the next 6 months (assuming the bill were enacted today); and second, who is a substantial energy reserve holder.

The term "substantial energy reserve holder" is defined to include any person who, individually or together with his affiliates, owns or has an interest in, 10 million barrels or more of proved reserves of crude oil, natural gas liquids equivalents, or natural gas equivalents.

Holdings of energy reserves are required to be reported to the Securities and Exchange Commission. The Financial Accounting Standards Board issued statement No. 69, "Disclosures About Oil and Gas Producing Activities," in November 1982. It is required to be adopted for fiscal years beginning after December 15, 1982, and was already in use by many companies for 1982. Therefore, the test of whether one is a "substantial energy reserve holder" would be an easy one, and would be based upon publically available information. No new reporting burden would be imposed by the bill.

Based upon information compiled by Arthur Anderson & Co., and included in the publication "Oil and Gas Reserve Disclosures—Survey of 300 Public Companies, 1980-1982" it would affect about 150 companies, including majors, independents, integrated, pipeline and diversified energy reserve holders. It would cover companies holding nearly 100 percent of this Nation's energy reserves.

Mr. President, there are serious public policy issues involved in the merger trend. Whether merger parties should have access to the resources on the public lands is a very important issue. I am looking forward to the Energy and Natural Resources Committee's examination of it. Perhaps companies are spending too much for reserves on the floor of the New York Stock Exchange rather than out in the oil patch. They may well find themselves unable to finance necessary oil and gas exploration and development after they complete their stock transactions. I certainly have an open mind on the subject, and am looking forward to a discussion of it in the weeks ahead.

I ask unanimous consent that a copy of my bill and a table on reserves be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2362

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Mineral Lands Leasing Act of 1920, as amended, (30 U.S.C. 181 *et seq.*) is further amended by inserting a new section as follows:

"LIMITATION ON AUTHORITY WITH RESPECT TO MERGER PARTIES

"SEC. 43. GENERAL PROHIBITION.—Notwithstanding any other provision of this Act, the Secretary is prohibited from issuing any lease or granting any right-of-way under the provisions of this Act to any person who is subject to the provisions of this section.

"(a) APPLICABILITY.—The provisions of this section shall apply to any person—

"(1) who is a party to a merger consummated after February 29, 1984, and prior to six months following the date of enactment of this section, and

"(2) who is a substantial energy reserve holder.

"(b) DEFINITIONS.—For purposes of this section, the term—

"(1) 'merger' includes mergers, consolidations, or acquisitions whereby one person acquires control or a majority of the assets of any other person;

"(2) 'substantial energy reserve holder' means any person who, individually or to-

Excerpt from letter from Raymond J. O'Connor, Chairman, Federal Energy Regulatory Commission, to Representative Richard L. Ottinger, February 17, 1984.

F. Comprehensive Plan Requirement

Question F.1.: Section 10 of the Federal Power Act requires that licenses issued by the Commission shall be on the condition that the project adopted —

SECTION 10 FEDERAL POWER ACT

> ...shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes.

Question F.1.a.: In the issuance of individual licenses for small hydro projects, how does the Commission implement this requirement?

Answer F.1.a.: In determining whether any hydropower project proposed to be licensed will be best adapted to a comprehensive plan for improving or developing a waterway or waterways, the Commission acts on the basis of the entire record before it in the proceeding. The Commission's decisions must be supported by substantial evidence.

To implement the requirement of Section 10(a) of the Federal Power Act, the Commission's procedures provide for developing the record on all aspects of beneficial public uses of the waterway or waterways involved. These procedures may be viewed as having basically four or perhaps five steps.

First, there is the application itself. The Commission's regulations require applicants for small hydropower projects to provide pertinent information and perform needed studies on engineering, economic, environmental, and other such matters. Applicants must consult with appropriate Federal, state, and local agencies.

The second and third steps, which occur concurrently, provide for agency comments and public notice of the application. When an application is found to be acceptable by Commission staff, the Commission staff solicits comments from Federal, state, and local agencies and governmental bodies. Additionally, notice of the application is given to the public with the opportunity for filing protests, motions to intervene, and comments.

Fourth, the Commission staff conducts its own independent review and analysis, using available information and developing additional information that may be needed so that the Commission

will have a sufficient record on all aspects of beneficial public uses relating to comprehensive development of the waterway.

A possible fifth step is a hearing on the application. A hearing typically will be held when material facts are in dispute as a result of Commission staff's review and analysis, matters raised in comments on the application, or matters raised in protests and motions to intervene.

Question F.1.b.: Has the Commission ever prepared such a "comprehensive plan"? If so, please identify each such plan.

Answer F.1.b.: Although the Commission has not prepared a specific "comprehensive plan" for any project proposed for licensing, it has acted on the basis of the record developed in each licensing proceeding. The Commission, through its staff, requires that the record be adequate with respect to all aspects of beneficial public uses of the waterway or waterways. Accordingly, the record should provide pertinent information on all beneficial public uses and thus contain the information that would constitute elements of a comprehensive plan.

Question F.1.c.: In implementing its responsibilities under section 10, as set forth above, does the Commission rely on plans developed by entities other than the Commission? Please explain. If not, is it the position of the Commission that it may not rely on plans developed by other entities?

Answer F.1.c.: The Commission has always relied upon plans, needs, and special requirements of the various Federal and non-Federal entities in carrying out its responsiblities under section 10(a) of the Federal Power Act. Most regions have numerous plans, studies, or proposals developed by several Federal, state, and local entities. The Commission considers the aggregate of these various studies and interests when implementing hydropower licensing actions.

Through its public notice program and requests for comments, the Commission develops additional input from a broad spectrum of interests that identify conflicting plans and expression of needs such as flood control, recreation, access, and municipal and industrial water needs, as well as environmental concerns.

Question F.1.d.: Does the Commission read this provision of section 10 as effectively requiring that there be in place a "plan" before the Commission may issue a license? Please explain.

Answer F.1.d.: The Commission has not read Section 10(a) of the Federal Power Act as requiring that a single "comprehensive plan" be prepared against which a proposed project is measured before a license is issued. Rather, a proposed project is measured against the aggregate of information on beneficial public uses of the waterway developed in the record in the proceeding.

For most waterways there will be available one or more plans. Some of these plans, however, will be of limited usefulness because of the passage of time since preparation. Even for recent plans, the dynamic nature of comprehensive planning supports the need for the gathering of additional information in the record. The Commission's procedures allow for input from ongoing planning activities at the Federal, state, regional, and local levels. These procedures also allow for input from the public and for the weighing by the Commission of opposing considerations.

Question F.2.: On November 15, 1982 the Northwest Power Planning Council issued its fish and wildlife protection program under section 4(h) of the Pacific Northwest Electric Power Planning and Conservation Act. On April 28, 1983, the Council issued its 20 year regional conservation and electric power plan under section 4(d) of the same act.

Question F.2.a.: Is either the plan or the program, or both of them taken together, an acceptable plan for purposes of the implementation of the Commission's responsibilities to consider licenses in the context of a "plan" under section 10? Please explain.

Answer F.2.a.: The Commission's staff believes that the fish and wildlife program and the conservation and electric power plan issued by the Northwest Power Planning Council (Council) are well-planned, comprehensive documents for natural resources and electric power planning within the Columbia River Basin. In consideration of the importance of the Council's activities, Commission staff has maintained a close working relationship with the Council and its staff, through face-to-face meetings and regular correspondence, to take into account to the fullest extent practicable the Council's programs. The Commission, however, is not bound to accept or adopt the Council's program, just as it has not been required to adopt similar comprehensive plans developed on other river basins. The Commission must maintain its role as an independent regulatory agency with a national, and not just a regional or river basin perspective.

Question F.2.b.: How is the Commission coordinating decisions on applications for preliminary permits, licenses and for exemptions on waterways covered by the Council's plan with the Council's recommendations in such plan regarding need for hydro development in the next 20 years?

Answer F.2.b.: Section 4(h) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, which established the Council, states in part that the Commission shall "exercise such responsibilities, taking into account at each relevant stage of

decisionmaking processes to the fullest extent practicable, the program adopted by the Council. . . ." Thus, in reviewing applications for preliminary permits, licenses, or exemptions in the Columbia River Basin, staff also reviews appropriate sections of the Council's plan and any comments submitted by the Council on the specific licensing or permitting action, to determine if a proposed action is consistent with the Council's plan. The Commission, in any action on a proposal, considers this staff analysis, as well as the recommendations of the Council.

Question F.2.c.: The Council is in the process of ranking potential hydropower sites in the Pacific Northwest with respect to their potential for impact on fish and wildlife. One category of site is that in which hydropower development would have an unacceptable, unmitigable impact on fish and wildlife. In addition, the Council will designate critical sites at which no hydropower development should be permitted. How will the Commission coordinate its preliminary permit, license and exemption decisions affecting such types of sites with the Council's survey and recommendations?

Answer F.2.c.: As described above in answer F.2.b., the Commission's staff will consider all aspects of the Council's plan and recommendations during each stage of the review process, to determine if a proposal is consistent with the Council's plan. The independent staff analysis and the Council's recommendations would be considered by the Commission in any action it takes on a proposal.

Question F.2.d.: Since promulgation of the fish and wildlife program, how has the Commission reflected the Council's fish and wildlife protection measures in preliminary permit, exemption and license decisions rendered with respect to waterways covered by the fish and wildlife program?

Answer F.2.d.: As described above in answers F.2.b. and F.2.c., the Commission's staff reviews project proposals to determine consistency with the Council's program. Staff also reviews recommendations made by Federal and state fish and wildlife agencies, which in the case of exemptions become terms and conditions for the exemption. The resource agencies' recommendations usually have closely paralleled the requirements of the Council's program, although these recommendations have been even more specific than the program's general guidelines. In some cases the Commission has adopted agency or Council recommendations, and made them requirements of a license. If not, alternative measures have been provided and an explanation given as to why the Council's measure was not accepted. The Commission has also included, since May 1982, an article in licenses and exemptions issued in the Columbia River Basin that reserves the Commission's right to require future changes in project structures or operations in order to take into account the Council's fish and wildlife program. A similar article, requiring that the Council's program be taken into account, is also included in preliminary permits.

Question F.3.: Several states, including Maine, have developed or are developing hydropower plans for the waterways within their boundaries.

Question F.3.a.: Is the plan ["Comprehensive Hydropower Plan, State of Maine," October 1, 1982] submitted by Maine to the Commission acceptable to the Commission for purposes of implementation of the Commission's responsibilities under section 10 of the Federal Power Act as set forth above. Please explain. If no answer to this question can be given at present, when will the Commission respond to Maine's submitted plan?

Answer F.3.a.: The 1982 report of the State of Maine is a major consideration when permits or licenses are issued for hydropower in Maine. Other important considerations are current plans of the Federal construction agencies as well as all existing hydropower projects, non-power storage developments, and non-Federal proposals in the form of permit and license applications.

However, there is not total reliance on any single plan. Because conditions and needs change, the latest information is used in licensing activities. Governor Brennan's letter to the Commission transmitting the Hydropower Plan report recognizes this procedure and requests that the Commission be guided, insofar as possible, by this plan.

No response to Maine's plan was requested; however, former Chairman Butler, by letter of August 3, 1982, did respond to an Executive Order entitled "Maine Rivers Policy." Governor Brennan was assured that matters of concern, as addressed in the State of Maine's policy, would be considered in the FERC's evaluation of hydroelectric license applications.

Question F.3.b.: Under what conditions would a state-submitted plan be acceptable to the Commission for purposes of guiding the Commission in its decisions regarding licenses, as well as preliminary permits and exemptions?

Answer F.3.b.: As mentioned earlier, the plans and concerns of each of the Federal and state agencies as well as other local interests are fully considered in decisions to issue permits or licenses. The Maine Hydropower Plan as well as its Rivers Study are helpful and important documents in assuring that the Commission's licensing and permitting actions will be based on consideration of all existing developments and pertinent plans and studies.

Hundreds of river basin plans generated over the years have played an important role in licensing and other Commission actions pursuant to various Flood Control and River and Harbors Acts and other legislation. They have varied widely as to their comprehensive

nature. Each of the Federal, state, and private entities involved have their special mandates and concerns. Some, especially those prepared by interagency committees and commissions, have been very "comprehensive" in nature. Others serve to describe a single interest or concern. Reports such as those prepared by the New York-New England-Inter-Agency Committee, Columbia Basin Inter-Agency Committee, and various River Basin Commissions of the Water Resources Council have served in the past to facilitate meeting 10(a) requirements.

The Maine Rivers Policy

The Maine Rivers Policy, which the State submitted to the Federal Energy Regulatory Commission on October 1, 1982, as the State's comprehensive plan for hydropower development pursuant to Section 10(a), includes the following:

1. Executive Order #1, FY82/83
2. The Maine Rivers Study, June 1982
3. The Projected Contribution of Hydroelectric Generation to Meeting Maine's Electricity Needs in 1990 and 2000, September 1982
4. Statewide Fisheries Management Plan, June 1982

Because of the length of these documents, they are not being presented to the Committee at this time, but they are available on request from:

Maine State Planning Office
Attn: Karen Massey
State House Station #38
Augusta, Maine 04333
tel: 207-289-3261

A copy of the implementing legislation, the fifth component of the Maine Rivers Policy, is attached for your consideration.

Any balance of any allocation or subdivision of an allocation from the Highway Fund made by the Legislature for any department or agency, which at any time may not be required for the purposes named in that allocation or subdivision, may be transferred at any time prior to the closing of the books, to any other allocation or subdivision of an allocation from the Highway Fund made by the Legislature for the same fiscal year, subject to review by the joint standing committee of the Legislature having jurisdiction over transportation. Financial orders describing these transfers shall be submitted by the Bureau of the Budget to the Legislative Finance Office 30 days before the transfer is to be implemented.

Sec. 3. 23 MRSA §1654 is enacted to read:

§1654. Transfers from unallocated highway fund surplus

The Governor may allocate from the unallocated highway fund surplus account amounts not to exceed in total the sum of $1,000,000 in any 2-year budget period.

Funds may be allocated from the account to meet any emergency expense necessarily incurred under any requirement of law or to pay expenses arising out of an emergency requiring an expenditure of money not provided by the Legislature. The Governor shall determine the necessity for these allocations upon consultation with the Commissioner of Transportation and the State Budget Officer.

All such allocations from the highway fund surplus account shall be supported by a statement of facts setting forth the necessity for the allocation. A copy of each order for an allocation, together with the statement of facts, shall be provided to the Legislative Finance Office, President of the Senate and Speaker of the House of Representatives when the allocation is made.

The State Controller shall include in his official annual financial report at the close of each fiscal year a statement showing all transfers made from the highway fund surplus account for the fiscal period.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.

Effective June 17, 1983.

CHAPTER 458

S.P. 398 - L.D. 1721

AN ACT to Promote the Wise Use and Management of Maine's Outstanding River Resources.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 12 MRSA c. 200 is enacted to read:

CHAPTER 200

MAINE'S RIVERS

§401. Maine's rivers

The Legislature finds:

1. Rivers and streams a natural resource. That the State's nearly 32,000 miles of rivers and streams comprise one of its most important natural resources, historically vital to the state's commerce and industry and to the quality of life enjoyed by Maine people;

2. Increase in value of rivers and streams. That the value of its rivers and streams has increased in recent years due to the improvement in the quality of their waters, the restoration of their fisheries, the growth in demand for hydropower and the expanding interest in river recreation activities, leading at times to conflict among these uses;

3. Use of rivers and streams. That its rivers and streams afford the state's people with major opportunities for the enjoyment of nature's beauty, unique recreational activities and solace from an industrialized society, as well as for economic expansion through the development of hydropower, the revitalization of waterfronts and ports and the attraction of both tourists and desirable new industries; and

4. Policy. That the best interests of the state's people are served by a policy which recognizes the importance that their rivers and streams have for meeting portions of several public needs, provides guidance for striking a balance among the various uses which affords the public maximum benefit and seeks harmony rather than conflict among these uses.

§402. Declaration of policy

In its role as trustee of the public waters, the Legislature declares that the well-being of the citizens of this State depends on striking a carefully considered and well-reasoned balance among the competing uses of the state's rivers and streams. Further, the Legislature declares that such a balance shall:

1. Restoration of water. Restore waters to a condition clean enough to allow fishing and swimming in all our rivers and streams;

2. Revitalization of waterfronts. Revitalize waterfronts and ports;

3. Maintenance of scenic beauty. Maintain, even in areas where development occurs, the scenic beauty and character of our rivers;

4. Interests of riparian owners. Recognize and respect the rightful interests of riparian owners;

5. Increase hydroelectric power. Increase the hydroelectric power available to replace foreign oil in the State;

6. Hydropower development. Streamline procedures to facilitate hydropower development under reasoned environmental, technical and public safety constraints;

7. Fisheries. Restore anadromous fisheries and improve the productivity of inland fisheries;

8. Recreation. Expand the opportunities for outdoor recreation; and

9. Outstanding river stretches. Protect the special resource values of the flowing waters and shorelands of the state's most outstanding river stretches, as identified by the Department of Conservation's 1982 Maine Rivers Study and as specifically delineated in this chapter.

Further, the Legislature finds that with careful planning our foreseeable needs for all of these uses may be reasonably integrated harmoniously with one another on the state's 32,000 miles of rivers and streams.

1403. Special protection for outstanding rivers

The Legislature declares that certain rivers, because of their unparalleled natural and recreational values, provide irreplaceable social and economic benefits to the people in their existing state. It is the Legislature's intent that no new dams be constructed on these river and stream segments without the specific authorization of the Legislature, and that additional development or redevelopment of dams existing on these segments, as of the date of the enactment of this section, shall be designed and executed in a manner that either enhances or does not diminish the significant resource values of these river segments identified by the 1982 Maine Rivers Study. No license or permit under Title 38, sections 630 to 634 may be issued for construction of new dams on the river and stream segments subject to this special protection without the specific authorization of the Legislature, or for additional development or redevelopment of existing dams on the river and stream segments subject to this special protection where the additional development or redevelopment diminishes the significant resource values of these river and stream segments.

Further, the Legislature finds that projects inconsistent with this policy on new dams and redevelopment of existing dams will alter the physical and chemical characteristics and designated uses of the waters of these river and stream segments. It finds that these impacts are unacceptable and constitute violations of the state's water quality standards. The Legislature directs that no project which fails to meet the requirements of this section may be certified under the United States Clean Water Act, Section 401.

For purposes of this section, outstanding river and stream segments meriting special protection shall include:

1. Allagash River. The Allagash River from Gerald Brook in Allagash up to but not including the Churchill Dam in T.10, R.12, W.E.L.S., including its tributaries the Musquacook Stream from the Allagash River to the outlet of Third Musquacook Lake in T. 11, R. 11, W.E.L.S.; Allagash Stream from its inlet to Chamberlain Lake to the outlet of Allagash Pond in T.9, R.15, W.E.L.S.; and Chamquasabamticook Stream from its inlet into Long Lake to the outlet of Chamquasabamticook Lake, excluding Round Pond in T.13, R.12, W.E.L.S., Harvey Pond, Long Lake, Umsaskis Lake, Musquacook Lakes (1-7), Little Round Pond in T.8, R.13, W.E.L.S., Allagash Lake and Clayton Lake;

2. Aroostook River. The Aroostook River from and including the Sheridan Dam in Ashland to Millinocket Stream, including its tributaries Millinocket Stream from the Aroostook River to the outlet of Millinocket Lake; Munsungan Stream from the Aroostook River to the outlet of Little Munsungan Lake; St. Croix Stream from the Aroostook River to Hall Brook in T.9, R.5, W.E.L.S.; and the Big Machias River from the Aroostook River to the outlet of Big Machias Lake, excluding Round Pond in T.7, R.9, W.E.L.S.;

3. Dead River. The Dead River from the Kennebec River to the upstream limit of Big Eddy;

4. Dennys River. The Dennys River from Hinckley Point in Dennysville to the outlet of Meddybemps Lake;

5. East Machias River. The East Machias River, including the Maine River, from the Route 191 bridge in East Machias to the outlet of Pocomoonshine Lake, excluding Hadley Lake, Second Lake, Round Lake, Crawford Lake, Lower Mud Lake and Upper Mud Lake;

6. Fish River. The Fish River from its inlet into St. Froid Lake in T.14, R. 7, W.E.L.S. to the outlet of Mud Pond in T.13, R. 8, W.E.L.S., excluding Fortune Lake, Round Pond and Fish River Lake.

7. Kennebec River. The Kennebec River from Bay Point in Georgetown to the Father Curran Bridge in Augusta and from the confluence of the Dead River with the Kennebec River up to, but not including, the Harris Dam in Indian Stream Township;

8. Machias River. The Machias River, including Fourth and Fifth Lake Streams, from Fort O'Brien in Machias to the outlet of Fifth Machias Lake, including its tributaries the West Branch Machias River from the Machias River to the outlet of Lower Sabao Lake; Old Stream from the Machias River to the outlet of First Lake; and Mopang Stream from the Machias River to the outlet of Mopang Second Lake, excluding Machias Lakes (1-6), Lower Pond and Mopang First Lake;

9. Mattawamkeag River. The Mattawamkeag River from the Penobscot River to the Mattawamkeag and Kingman Township townline.

10. Moose River. The Moose River from its inlet into Attean Pond to its confluence with Number One Brook in Beattie Township;

11. Narraguagus River. The Narraguagus River from the Route 1 bridge in Cherryfield to the outlet of Eagle Lake, excluding Beddington Lake and Deer Lake;

12. Penobscot River. The Penobscot River, including the Eastern Channel, from Sandy Point in Stockton Springs up to, but not including, the Veazie Dam, including its tributaries the West Branch of the Penobscot from its inlet into Ambejejus Lake to the western boundary of T.3, R.10, and from its inlet into Chesuncook Lake up to, but not including, the dam at Seboomook Lake; the East Branch Penobscot River from the Penobscot River up to, but not including, the dam at the outlet of Grand Lake Matagamon; the Wassataquoik Stream from the East Branch of the Penobscot River to Annis Brook in T.4, R.9, W.E.L.S.; the Webster Brook from its inlet into Grand Lake Matagamon up to, but not including, Telos Dam in T.5, R.11, W.E.L.S.; the Seboeis River from the East Branch of the Penobscot River to the outlet of Snowshoe Lake; and the Sawtelle Brook from the Seboeis River up to, but not including, the dam at the outlet of Sawtelle Deadwater, excluding Passamagamet Lake, Webster Lake and White Horse Lake; Snowshoe Lake;

13. Pleasant River. The Pleasant River from Seavey Point in Addison to the outlet of Pleasant River Lake;

14. Rapid River. The Rapid River from the Magalloway Plantation and Upton townline to the outlet of Pond in the River;

15. Saco River. The Saco River from the Little Ossipee River to the New Hampshire border;

16. St. John River. The St. John River from one mile above the foot of Big Rapids in Allagash to the Baker Branch, including its tributaries the Big Black River from the St. John River to the Canadian border; the Northwest Branch from the St. John River to the outlet of Beaver Pond in T.12, R.17, W.E.L.S.; the Southwest Branch from the Baker Branch to 5 miles downstream of the Canadian border; and the Baker Branch from the St. John River to 1.5 miles below Baker Lake;

17. Sheepscot River. The Sheepscot River from

the Route 1 bridge in Wiscasset to Halldale Road in Montville, excluding Long Pond and Sheepscot Pond, including its tributaries the West Branch of the Sheepscot from its confluence with the Sheepscot River in Whitefield to the outlet of Branch Pond in China; and

18. West Branch Pleasant River. The West Branch Pleasant River from the East Branch to the outlet of Fourth West Branch Pond in Shawtown Township, excluding Silver Lake and West Branch Ponds (1-3).

§404. Maine Guarantee Authority

The Maine Guarantee Authority may not finance any energy generating system project under Title 10, chapter 110, if that project is located in whole or in part on any river listed in section 403.

§405. St. Croix River

1. Special consideration. In consideration of the special status of the St. Croix River as an international boundary governed in part by the International Joint Commission and the Province of New Brunswick, the Legislature establishes the following provisions.

2. Commercial, industrial or residential development. Except as provided in this subsection, no person may undertake any further commercial, industrial or residential development in the area within 250 feet of the St. Croix River from the Grand Falls flowage to the north end of Wingdam Island. The following activities shall be exempt from these provisions:

A. Development of hydroelectric or other dams, plants and related facilities or improvements subject to the conditions described in subsection 3;

B. A bridge at Vanceboro;

C. A haul road from Grand Falls;

D. Activities and developments related to timber harvesting, mining or extraction of sand and gravel; and

E. Any recreational management activity conducted or approved by the State.

3. New hydroelectric dams. No person may develop new hydroelectric dams on the St. Croix River from Grand Falls to the north end of Wingdam Island without first:

A. Having performed a feasibility study by a qualified consultant approved by the Governor to examine the alternative potentials for hydropower development downstream from Grand Falls and make the findings available to the State for review;

B. Having consulted with the office of the Governor or other agency of the State, designated by him, regarding the feasibility of this downstream development; and

C. Having determined that there exists no economically feasible site downstream from Grand Falls.

In the event that the State disagrees with any of the assumptions, findings or conclusions of the economic feasibility study, the comments of the State shall be considered and responded to by the consultant. These comments and the responses of the consultant shall be noted in the final report of the economic feasibility study.

4. Review. This section shall be reviewed every 5 years, and shall be repealed on January 1, 1988, unless reenacted by the Legislature for an additional 5-year period. In the event that the St. Croix River is included in any legislative Act or regulation which directly or indirectly has as its effect the essential prohibition of construction of new dams or development or redevelopment of existing dams on the St. Croix River, this section shall be repealed on the effective date of that Act or regulation.

§406. Report

The State Planning Office shall provide a report no later than December 1, 1986, to the Legislature detailing the status of policy accomplishments pursuant to this chapter.

Sec. 3. 12 MRSA §4811, as amended by PL 1973, c. 544, §1, is further amended by adding after the first paragraph a new paragraph to read:

It is further declared that, in accordance with section 403, certain river and stream segments, as identified in the Department of Conservation's 1982 Maine Rivers Study and as specifically delineated in section 4811-B, are significant river segments and deserve special shoreland zoning controls designed to protect their natural and recreation features.

Sec. 3. 12 MRSA §4811-A, as enacted by PL 1973, c. 544, §2, is repealed and the following enacted in its place:

§4811-A. Definitions

As used in this chapter, unless the context indicates otherwise, the following terms have the following meanings.

1. Pond. "Pond" means any inland body of water which has a surface area in excess of 10 acres, except where the body of water is man-made and in addition is completely surrounded by land held by a single owner, and except those privately owned ponds which are held primarily as waterfowl and fish breeding areas or for hunting and fishing.

2. Principal structure. "Principal structure" means a building other than one which is used for purposes wholly incidental or accessory to the use of another building on the same premises.

3. River. "River" means a free flowing body of water from that point at which it provides drainage for a watershed of 25 square miles to its mouth.

4. Screening. "Screening" means a buffer strip of vegetation retained between the permitted use and the normal high water mark of a protected river segment. Within this buffer strip, no clear cutting is permitted, except that openings not greater than 10 feet in width for every 100 feet of shoreline may be created. Selective cutting of no more than 40% of the trees 4 inches or more in diameter measured at 4 1/2 feet above ground level is allowed in any 10-year period, provided that a well-distributed stand of trees remains.

Sec. 4. 12 MRSA §4811-B is enacted to read:

§4811-B. Significant river segments identified

For purposes of this chapter, significant river segments include the following:

1. Aroostook River. The Aroostook River from St. Croix Stream in Masardis to the Masardis and T.10, R.6, W.E.L.S. townline, excluding segments in T.9, R.5, W.E.L.S., including its tributary the Big

Machias River from the Aroostook River in Ashland to the Ashland and Garfield Plantation townlines;

2. Dennys River. The Dennys River from the railroad bridge in Dennysville Station to the dam at Meddybemps Lake, excluding the western shore in Edmunds Township and No. 14 Plantation;

3. East Machias River. The East Machias River from 1/4 of a mile above the Route 1 bridge in East Machias to the East Machias and T.18, E.D., B.P.P. townline, and from the T.19, E.D., B.P.P. and Wesley townline to the outlet of Crawford Lake in Crawford, excluding Hadley Lake;

4. Fish River. The Fish River from the bridge in Fort Kent Mills to the Fort Kent and Wallagrass Plantation townline, and from the Portage Lake and T.14, R.6, townline to the Portage Lake and T.13, R.7, W.K.L.S. townline, excluding Portage Lake;

5. Machias River. The Machias River from the Whitneyville and Machias townline to the Northfield T.19, M.D., B.P.P. townline;

6. Mattawamkeag River. The Mattawamkeag River from the outlet of Mattakeunk Stream in Winn to the Mattawamkeag and Kingman Township townline, and from the Reed Plantation and Bancroft townline to the East Branch, including its tributaries the West Branch from the Mattawamkeag River to the Haynesville T.3, R.3, W.E.L.S. townline and from its inlet into Upper Mattawamkeag Lake to the Route 2 bridge, the East Branch from the Mattawamkeag River to the Haynesville and Forkstown Township townline and from the T.6, R.1, W.E.L.S. and Oakfield townline to Red Bridge in Oakfield; the Fish Stream from the Route 95 bridge in Island Falls to the Crystal-Patten townline; and the Baskahegan Stream from its inlet into Crooked Brook Flowage in Danforth to the Danforth and Brookton Township townline;

7. Narraguagus River. The Narraguagus River from the ice dam above the railroad bridge in Cherryfield to the Beddington and Devereaux Township townline, excluding Beddington Lake;

8. East Branch of Penobscot. The East Branch of the Penobscot from the Route 157 bridge in Medway to the East Millinocket and Grindstone Township townline;

9. Pleasant River. The Pleasant River from the railroad bridge in Columbia Falls to the Columbia and T.18, M.D., B.P.P. townline, and from the T.24, M.D., B.P.P. and Beddington townline to the outlet of Pleasant River Lake;

10. Rapid River. The Rapid River from the Magalloway Plantation and Upton townline to the outlet of Pond in the River;

11. West Branch Pleasant River. The West Branch Pleasant River from the East Branch to the Brownville and Williamsburg Township townline; and

12. West Branch of Union River. The West Branch of the Union River from the Route 9 bridge in Amherst to the outlet of Great Pond in the Town of Great Pond.

Sec. 5. 12 MRSA §§4815, 4816 and 4817 are enacted to read:

§4815. Enforcement

Any person who orders or conducts any activity in violation of a municipal ordinance adopted under this chapter shall be subject to a civil forfeiture of not less than $100 nor more than $1,000 for each offense. The Attorney General, the district attorney or the municipal officers may enforce ordinances adopted under this chapter. The court may award municipalities reasonable attorney fees for actions under this section, and ordinances may provide that civil forfeitures shall inure to the municipality.

No public utility, water district, sanitary district or any utility company of any kind may install services to any new structure located in a shoreland area, as defined by section 4811, unless written authorization attesting to the validity and currency of all local permits required under this chapter has been issued by the appropriate municipal officials.

§4816. Guidelines for shoreland zoning along significant river segments

In addition to the guidelines adopted under section 4812, the following guidelines for the protection of the shorelands shall apply along significant river segments identified in section 4811-B. These guidelines are intended to maintain the special values of these particular river segments by protecting their scenic beauty and undeveloped character.

1. New principal structures. New principal structures, except for structures related to hydropower facilities, shall be set back a minimum of 125 feet from the normal high-water mark of the river. These structures shall be screened from the river by existing vegetation.

2. New roads. Developers of new permanent roads, except for those providing access to a structure or facility allowed in the 250-foot zone, shall demonstrate that no reasonable alternative route outside of the zone exists. When roads must be located within the zone, they shall be set back as far as practicable from the normal high-water mark and screened from the river by existing vegetation.

3. New gravel pits. Developers of new gravel pits shall demonstrate that no reasonable mining site outside of the zone exists. When gravel pits must be located within the zone, they shall be set back as far as practicable from the normal high-water mark and no less than 75 feet and screened from the river by existing vegetation.

§4817. Municipal ordinance review and certification

Each municipality with shorelands along significant river segments, as identified in section 4811-B, shall review the adequacy of the zoning on these shorelands to protect the special values cited for these river segments by the Department of Conservation's 1982 Maine Rivers Study and for consistency with the guidelines established under section 4816. Prior to December 15, 1984, each such municipality shall certify to the State Planning Office either that its existing zoning for these areas is at least as restrictive as the guidelines established under section 4816, or that it has amended its zoning for this purpose. This certification shall be accompanied by the ordinances and zoning maps covering these areas. Failure to accomplish the purposes of this subsection shall result in adoption of suitable ordinances for these municipalities, as provided for in section 4813.

Sec. 6. 12 MRSA §7776-A is enacted to read:

§7776-A. Special protection for outstanding river segments

In accordance with section 402, outstanding river segments shall include:

1. Aroostook River. The Aroostook River from

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the Canadian border to the Masardis and T.10, R.6, W.E.L.S. townline, excluding the segment in T.9, R.7, W.E.L.S., including its tributaries the Big Machias River from the Aroostook River to the Ashland and Garfield Plantation townline and the St. Croix Stream from the Aroostook River in Masardis to the Masardis and T.9, R.5, W.E.L.S. townline;

2. Carrabassett River. The Carrabassett River from the Kennebec River to the Carrabassett Valley and Mt. Abram Township townline;

3. Crooked River. The Crooked River from its inlet into Sebago Lake in Casco to the Waterford and Albany Township townlines;

4. Dennys River. The Dennys River from the railroad bridge in Dennysville Station to the outlet of Meddybemps Lake, excluding the western shore in Edmunds Township and No. 14 Plantation;

5. East Machias River. The East Machias River, including the Maine River, from the old powerhouse in East Machias to the East Machias and T.18, E.D., B.P.P. townline, from the T.19, E.D., B.P.P. and Wesley townline to the outlet of Crawford Lake, and from the No. 21 Plantation and Alexander townline to the outlet of Pocomoonshine Lake, excluding Hadley Lake, Lower Mud Pond and Upper Mud Pond;

6. Fish River. The Fish River from the bridge in Fort Kent Mills to the Fort Kent and Wallagrass Plantation townline, from the T.15, R.6, W.E.L.S. and Eagle Lake townline to the Eagle Lake and Winterville Plantation townline, and from the T.16, R.6, W.E.L.S. and Portage Lake townline to the Portage Lake and T.13, R.7, W.E.L.S. townline, excluding Portage Lake;

7. Kennebago River. The Kennebago River from its inlet into Cupsuptic Lake to the Rangeley and Lower Cupsuptic Township townline;

8. Kennebec River. The Kennebec River from the Route 148 bridge in Madison to the Caratunk and The Forks Plantation townline, excluding the western shore in Concord Township, Pleasant Ridge Plantation and Carrying Place Township, and excluding Wyman Lake;

9. Machias River. The Machias River from the Route 1 bridge to the Northfield and T.19, M.D., B.P.P. townline, including its tributaries the Old Stream from the Machias River to the Northern post crossing of the Wesley and T.21, M.D., B.P.P. townline, excluding the segments in T.25, M.D., B.P.P. and T.21, M.D., B.P.P.;

10. Mattawamkeag River. The Mattawamkeag River from the Penobscot River to the Mattawamkeag and Kingman Township townline, and from the Reed Plantation and Bancroft townline to the East Branch, including its tributaries the West Branch from the Mattawamkeag River to the Haynesville and T.3, R.3, W.E.L.S. townline and from its inlet into Upper Mattawamkeag Lake to Island Falls to the Hersey and Moro Plantation townline; the East Branch from the Mattawamkeag River to the Haynesville and Forestown Township townline and from the T.5, R.3, W.E.L.S. and Garfield townline to the Smyrna and Dudley Township townline; the Fish Stream for the West Branch of the Mattawamkeag River to the Crystal and Patten townline; the Molunkus Stream from the Silver Ridge Township and Benedicta townline to the East Branch Molunkus Stream; the Macwahoc Stream from the Silver Ridge Township and Sherman townline to the outlet of Macwahoc Lake, and the Baskahegan Stream from the Mattawamkeag River to the Danforth and Brookton Township townline, and from the Brookton Township and Topsfield townline to the Topsfield and Kossuth Township townline, excluding Baskahegan Lake and Crooked Brook Flowage;

11. Narraguagus River. The Narraguagus River from the ice dam above the railroad bridge in Cherryfield to the Beddington and Deblois Township townline, excluding Beddington Lake;

12. Penobscot River. The Penobscot River from the Bangor Dam in Bangor to the Veazie Dam and its tributary the East Branch of the Penobscot from the Penobscot River to the East Millinocket and Grindstone Township townline;

13. Piscataquis River. The Piscataquis River from the Penobscot River to the Monson and Blanchard Plantation townline, including its tributaries the East and West Branches of the Piscataquis River from the Blanchard Plantation and Shirley townline to the Shirley and Little Squaw Township townline, the Sebois Stream from its confluence with the Piscataquis River in Howland to the Howland and Mattamiscontis Township townline and from the Mattamiscontis and Maxfield townline to the Maxfield and Medway Plantation townline, excluding Shirley Pond and West Shirley Bog;

14. Pleasant River. The Pleasant River from the dam in Columbia Falls (formerly the Nathaway Dam) to the Columbia and T.18, M.D., B.P.P. townline, and from the T.19, M.D., B.P.P. and Beddington townline to the outlet of Pleasant River Lake in Beddington;

15. Rapid River. The Rapid River from the Magalloway Plantation and Upton townline to the outlet of Pond in the River;

16. Saco River. The Saco River from the Little Ossipee River to the New Hampshire border;

17. St. Croix River. The St. Croix River from the cotton mill dam in Milltown to the Calais and Baring Plantation townline, from the Baring Plantation and Baileyville townline to the Baileyville and Fowler Township townline and from the Lambert Lake Township and Lambert townline to the outlet of Spednik Lake, excluding Woodland Lake and Grand Falls Flowage;

18. St. George River. The St. George River from the Route 90 bridge in Warren to the outlet of Lake St. George in Liberty, excluding White Oak Pond, Seven Tree Pond, Round Pond, Sennebec Pond, Trues Pond, Stevens Pond and Little Pond;

19. St. John River. The St. John River from the Hamlin Plantation and Van Buren townline to the Fort Kent and St. John Plantation townline, and from the St. John Plantation and St. Francis townline to the Allagash and St. Francis townline;

20. Sandy River. The Sandy River from the Kennebec River to the Madrid and Township E townline;

21. Sheepscot River. The Sheepscot River from the Head Tide dam in Alna to the Halldale Road in Montville, excluding Long Pond and Sheepscot Pond, including its tributary the West Branch of the Sheepscot from its confluence with the Sheepscot River in Whitefield to the outlet of Branch Pond in China;

22. West Branch Pleasant River. The West Branch Pleasant River from the East Branch to the Brownville and Williamsburg Township townline, and

23. West Branch Union River. The West Branch Union River from the Route 181 bridge in Mariaville to the outlet of Great Pond in the Town of Great Pond.

Sec. 7. 12 MRSA §7777, sub-§1, as enacted by PL 1979, c. 420, §1, is amended to read:

1. Eligibility. In order to obtain a permit, an

applicant shall demonstrate to the satisfaction of the commissioner that the proposed activity will not:

A. Unreasonably interfere with existing recreational and navigational uses;

B. Cause unreasonable soil erosion;

C. Unreasonably interfere with the natural flow of any waters;

D. Unreasonably harm any wildlife habitat; and

E. Lower the quality of any waters.

If the proposed activity is a crossing of an outstanding river segment, as identified in section 7776-A, the applicant shall demonstrate that no reasonable alternative exists which would have less adverse effect upon the natural and recreational features of the river segment.

Sec. 8. 12 MRSA §7780, sub-§1, as enacted by PL 1979, c. 420, §1, is amended to read:

1. Public works and private crossing and dam projects. Notwithstanding section 7776, that section shall not apply to river, stream or brook crossings in connection with public works projects which alter not more than a total of 200 feet in any mile of shore nor to private crossing or dam projects which alter not more than a total of 100 feet in any mile of shore. Alterations to both shores of the river, stream or brook shall be combined in arriving at a total shore footage. This exception shall not apply to any project on outstanding river segments, as identified in section 7776-A.

Sec. 9. 30 MRSA c. 203-A is enacted to read:

CHAPTER 203-A

RIVER CORRIDOR COMMISSIONS

§1961. River corridor commissions encouraged

1. Findings. The Legislature finds:

A. That the effectiveness of local governments in implementing their responsibilities under shoreland zoning can be enhanced by coordination and cooperation among municipalities;

B. That river corridor commissions have proven their effectiveness as one mechanism to bring about such coordination and cooperation;

C. That additional river corridor commissions are not likely to be formed without state encouragement and incentives; and

D. That such cooperation serves state interests as stated in Title 12, section 402 and chapter 815.

2. Purpose. It is the policy of the State to encourage the formation of river corridor commissions. The purpose of this law is to:

A. Clarify procedures for forming river corridor commissions;

B. Delegate authority to the Commissioner of Conservation to approve acceptable proposals to form the river corridor commissions;

C. Grant additional powers to those river corridor commissions beyond those provided for in chapter 203; and

D. Provide a portion of the funding for the operation of the river corridor commissions.

§1962. Definitions

As used in this chapter, unless the context indicates otherwise, the following terms have the following meanings.

1. Commission. "Commission" means a river corridor commission granted approval by the commissioner under section 1963.

2. Commissioner. "Commissioner" means the Commissioner of Conservation.

3. Department. "Department" means the Department of Conservation.

§1963. Approval of river corridor commissions

The commissioner may grant commission status and all the privileges and powers enjoyed by the commissions, as specified in this chapter, when he finds that:

1. Occupation of shoreland by 2 or more municipalities. Two or more municipalities, which collectively occupy enough of the shoreland on a river segment to be effective in managing the shorelands of the river, have entered into an agreement, pursuant to the requirements of chapter 203, which satisfies the requirements of section 1964;

2. Comprehensive plan. The same municipalities have prepared a comprehensive plan which satisfies the requirements of section 1965;

3. Ordinance. The same municipalities have prepared an ordinance to implement the comprehensive plan which satisfies the requirements of section 1966, and

4. Other commissions. No other commission exists on the same river, or the distance between the proposed and existing commissions makes the formation of one larger commission impractical.

§1964. Interlocal agreement

In addition to the requirements of section 1963, the interlocal agreement shall be consistent with regulations adopted by the commissioner under the Maine Administrative Procedure Act, Title 5, chapter 375. These regulations may include, but are not limited to:

1. Minimum duration. The minimum duration of the agreement;

2. Members; appointment. How members may be appointed;

3. Municipal responsibilities for financing. What the towns' responsibilities for financing the commission are; and

4. Withdrawal. How and under what circumstances towns may withdraw from the commission.

§1965. Comprehensive plan

The comprehensive plan shall be consistent with rules adopted by the commissioner under the Maine Administrative Procedure Act, Title 5, chapter 375. These rules may include, but are not limited to:

1. Resources; problems. What resources or problems the plan must address;

2. Information; analyses. Information and analyses the plan must contain; and

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3. Specificity; clarity. The degree of specificity and clarity sought in the plan.

§1966. Ordinance

The ordinance to implement the plan shall be at least as restrictive as the state's guidelines for municipal shoreland zoning ordinances and shall supersede existing shoreland zoning ordinances. The ordinance shall contain adequate procedures for processing permit requests and for considering appeals of a decision made by the commission.

§1967. Powers of a river corridor commission

Notwithstanding the provisions of section 1953, subsection 6, an approved commission may exercise the following powers:

1. Amendment to comprehensive plan. To amend the comprehensive plan, after notice and hearing on the proposed amendment in accordance with the Maine Administrative Procedure Act, Title 5, chapter 375;

2. Adoption of rules, regulations or ordinances. To adopt and amend rules, regulations or ordinances covering an area up to 500 feet from the normal high-water mark necessary to implement the comprehensive plan, after notice and hearing on the proposed amendment or adoption, in accordance with the Maine Administrative Procedure Act, Title 5, chapter 375;

3. Issuance of permits. To issue permits, subject to reasonable conditions for activities requiring permits, or to deny permits pursuant to ordinances and regulations adopted by the commission;

4. Fees. To assess fees for permit or variance applications, or for any publications of the commission;

5. Suit. To sue and be sued; and

6. Enforcement. To enforce the rules, ordinances or regulations of the commission by instituting any lawful action, injunction or other proceeding to prevent, restrain, correct or abate any violation of its rules, regulations or ordinances, and to impose fines as permitted under Title 12, chapter 424.

§1968. Commission budget; financing; staff

The commission shall prepare and submit to the commissioner a biennial budget sufficient to cover its operating and other expenses. Provided the commission continues to satisfy the requirements of section 1953, the commissioner shall request funds to match the funds raised by the commission, in no event may the state contribution exceed $25,000 for any one commission in any year. The commission may accept contributions of any type from any source to assist it in carrying out its assigned tasks, and make such agreements with respect to the administration of such funds, not inconsistent with the purpose of this law, as are required as conditions precedent to receiving such funds, federal or otherwise. Staff of the commission shall not be considered employees of the State.

§1969. Appeals to Superior Court

Except where otherwise specified by law, any party or person aggrieved by any order or decision of the commission may, within 30 days after notice of the filing of that order or decision, appeal to the Superior Court by filing a notice of appeal stating the grounds for appeal. The appeals shall be taken pursuant to Title 5, section 11001.

Sec. 10. 30 MRSA §4956, sub-§1, as repealed and replaced by PL 1975, c. 475, §1, is amended by adding at the end a new paragraph to read:

A "densely developed area" is defined as any commercial, industrial or compact residential area of 10 or more acres with an existing density of at least one principal structure per 2 acres. A principal structure is defined as any building other than one which is used for purposes wholly incidental or accessory to the use of another building on the same premises.

Sec. 11. 30 MRSA §4956, sub-§1-A is enacted to read:

1-A. Special protection for the shorelands of outstanding river segments. In accordance with Title 12, section 402, outstanding river segments shall include:

A. The Aroostook River from the Canadian border to the Masardis and T.10, R.6, W.E.L.S. townline, excluding the segment in T.9, R.5, W.E.L.S.;

B. The Carrabassett River from the Kennebec River to the Carrabassett Valley and Mt. Abram Township townline;

C. The Crooked River from its inlet into Sebago Lake to the Waterford and Albany Township townline;

D. The Damariscotta River from the Route 1 bridge in Damariscotta to the dam at Damariscotta Mills;

E. The Dennys River from the Route 1 bridge to the outlet of Meddybemps Lake, excluding the western shore in Edmunds Township and No. 14 Plantation;

F. The East Machias River, including the Maine River, from 1/4 of a mile above the Route 1 bridge to the East Machias and T.18, E.D., B.P.P. townline, from the T.19, E.D., B.P.P. and Wesley townline to the outlet of Crawford Lake, and from the No. 21 Plantation and Alexander townline to the outlet of Pocomoonshine Lake, excluding Hadley Lake, Lower Mud Pond and Upper Mud Pond;

G. The Fish River from the bridge at Fort Kent Mills to the Fort Kent and Wallagrass Plantation townline, from the T.16, R.5, W.E.L.S. and Eagle Lake township to the Eagle Lake and Winterville Plantation townline, and from the T.16, R.6, W.E.L.S. and Portage Lake township to the Portage Lake and T.13, R.7, W.E.L.S. townline, excluding Portage Lake;

H. The Kennebec River from its inlet into Cupsuptic Lake to the Rangeley and Lower Cupsuptic Township townline;

I. The Kennebec River from Thorne Head Narrows in North Bath to the Edwards Dam in Augusta, excluding Perkins Township, and from the Route 148 bridge in Madison to the Caratunk and the Forks Plantation townline, excluding the western shore in Concord Township, Pleasant Ridge Plantation and Carrying Place Township and excluding Wyman Lake;

J. The Machias River from the Route 1 bridge to the Northfield and T.19, M.D., B.P.P. townline;

K. The Mattawamkeag River from the Penobscot River to the Mattawamkeag and Kingman Township townline, and from the Reed Plantation and Lagercrantz townline to the East Branch in Haynesville;

L. The Narraguagus River from the ice dam above the railroad bridge in Cherryfield to the Beddington and Devereaux Township townlines, excluding Beddington Lake;

M. The Penobscot River, including the Eastern Channel, from Sandy Point in Stockton Springs to the Veazie Dam and its tributary the East Branch of the Penobscot from the Penobscot River to the East Millinocket and Grindstone Township townline;

N. The Piscataquis River from the Penobscot River to the Monson and Blanchard Plantation townline;

O. The Pleasant River from the bridge in Addison to the Columbia and T.18, M.D., B.P.P. townline, and from the T.24, M.D., B.P.P. and Beddington townline to the outlet of Pleasant River Lake;

P. The Rapid River from the Magalloway Plantation and Upton townline to the outlet of Pond in the River;

Q. The Saco River from the Little Ossipee River to the New Hampshire border;

R. The St. Croix River from the Route 1 bridge in Calais to the Calais and Baring Plantation townline, from the Baring Plantation and Baileyville townline to the Baileyville and Fowler Township townline, and from the Lambert Lake Township and Vanceboro townline to the outlet of Spednik Lake, excluding Woodland Lake and Grand Falls Flowage;

S. The St. George River from the Route 1 bridge in Thomaston to the outlet of Lake St. George in Liberty, excluding White Oak Pond, Seven Tree Pond, Round Pond, Sennebec Pond, Trues Pond, Stevens Pond and Little Pond;

T. The St. John River from the Van Buren and Hamlin Plantation townline to the Fort Kent and St. John Plantation townline, and from the St. John Plantation and St. Francis townline to the Allagash and St. Francis townline;

U. The Sandy River from the Kennebec River to the Madrid and Township E townline;

V. The Sheepscot River from the railroad bridge in Wiscasset to the Halidale Road in Montville, excluding Long Pond and Sheepscot Pond, including its tributary the West Branch of the Sheepscot from its confluence with the Sheepscot River in Whitefield to the outlet of Branch Pond in China;

W. The West Branch Pleasant River from the East Branch in Brownville to the Brownville and Williamsburg Township townline; and

X. The West Branch Union River from the Route 181 bridge in Marlsville to the outlet of Great Pond in the Town of Great Pond.

Sec. 12. 30 MRSA §4956, sub-§3, ¶L, as repealed and replaced by PL 1971, c. 454, is amended to read:

L. Whenever situated, in whole or in part, within 250 feet of any pond, lake, river or tidal waters, will not adversely affect the quality of such that body of water or unreasonably affect the shoreline of such that body of water.

Furthermore, when lots in a subdivision have frontage on an outstanding river segment, as defined in subsection 1-A, the proposed subdivision plan shall require principal structures to have a combined lot shore frontage and setback from the normal high-water mark of 500 feet. To avoid circumventing the intent of this provision, whenever a proposed subdivision adjoins a shoreland strip narrower than 250 feet which is not lotted, the proposed subdivision shall be reviewed as if lot lines extended to the shore. These frontage and set-back provisions shall not apply either within areas zoned as general development or its equivalent under shoreland zoning, Title 12, section 4813, or within areas designated by ordinance as densely developed. The determination of which areas are densely developed shall be based on a finding that, as of the effective date of this Act, existing development meets the requirements of subsection 1.

Sec. 13. 33 MRSA §668, first ¶, as enacted by PL 1969, c. 566, §2, is amended to read:

No conservation restriction as defined in section 667 held by any governmental body or held on a river shoreline by a private nonprofit corporation of this State, whose purposes include conservation of land or water areas or of a particular such area, shall may be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or, a private nonprofit corporation of this State with like purposes. All such restrictions shall be duly recorded and indexed in the registry of deeds for the county where the land lies so as to affect its title, in the manner of other conveyances of interests in land, and shall describe the land subject to said the restrictions by adequate legal description or by reference to a recorded plan showing its boundaries.

Sec. 14. 38 MRSA §621, as enacted by PL 1979, c. 465, is repealed.

Sec. 15. 38 MRSA §622, as amended by PL 1981, c. 470, Pt. A, §160, is repealed.

Sec. 16. 38 MRSA §§623-625, as enacted by PL 1979, c. 465, are repealed.

Sec. 17. 38 MRSA §626, as amended by PL 1981, c. 470, Pt. A, §169, is repealed.

Sec. 18. 38 MRSA c. 5, sub-c. 1, Art. 1, sub-art. 1-B is enacted to read:

Subarticle 1-B. Permits for hydropower projects

§630. Short title

This subarticle may be cited and referred to in proceedings and agreements as the "Maine Waterway Development and Conservation Act."

§631. Purposes

1. Findings. The Legislature finds and declares that the surface waters of the State constitute a valuable indigenous and renewable energy resource; and that hydropower development utilizing these waters is unique in its benefits and impacts to the natural environment, and makes a significant contribution to the general welfare of the citizens of the State for the following reasons.

A. Hydropower is the state's only economically feasible, large-scale energy resource which does not rely on combustion of a fuel, thereby avoiding air pollution, solid waste disposal problems and hazards to human health from emissions, wastes and by-products. Hydropower can be developed at many sites with minimal environmental impacts, especially at sites with existing dams or where current type turbines can be used.

B. Like all energy generating facilities, hydropower projects can have adverse effects; in contrast with other energy sources, they may also have positive environmental effects. For example, hydropower dams can control floods and augment downstream flow to improve fish and wild-

life habitats, water quality and recreational opportunities.

C. Hydropower is presently the state's most significant indigenous resource that can be used to free our citizens from their extreme dependence on foreign oil for peaking power.

2. Policy and purpose. The Legislature declares that hydropower justifies singular treatment. The Legislature further declares that it is the policy of the State to support and encourage the development of hydropower projects by simplifying and clarifying requirements for permits, while assuring reasonable protection of natural resources and the public interest in use of waters of the State. It is the purpose of this subarticle to require a single application and permit for the construction of all hydropower projects and for the reconstruction or structural alteration of certain projects, including water storage projects. The permit application process shall be administered by the Department of Environmental Protection, except that, for hydropower projects within the jurisdiction of the Maine Land Use Regulation Commission, the commission shall administer the permit application process under this subarticle.

§632. Definitions

As used in this subarticle, unless the context indicates otherwise, the following terms have the following meanings.

1. Board. "Board" means the Board of Environmental Protection, except that, for any hydropower project within the jurisdiction of the Maine Land Use Regulation Commission, "board" means the Maine Land Use Regulation Commission.

2. Department. "Department" means the Department of Environmental Protection.

3. Hydropower project. "Hydropower project" means any development which utilizes the flow of water as a source of electrical or mechanical power or which regulates the flow of water for the purpose of generating electrical or mechanical power. A hydropower project development includes all powerhouses, dams, water conduits, transmission lines, water impoundments, roads and other appurtenant works and structures that are part of the development.

§633. Prohibition

1. Permit required. No person may initiate construction or reconstruction of a hydropower project, or structurally alter a hydropower project in ways which change water levels or flows above or below the dam, without first obtaining a permit from the board.

2. Exceptions. This subarticle shall not apply to activities for which, prior to the effective date of this Act, a permit or permits have been issued pursuant to any of the following laws: Land use regulation laws, Title 12, sections 681 to 689; stream alteration laws, Title 12, sections 7776 to 7780; great ponds laws, sections 391 to 394; alteration of coastal wetlands laws, sections 471 to 478; site location of development laws, sections 481 to 490; and small hydroelectric generating facilities laws, sections 621 to 626.

3. Exemptions. Normal maintenance and repair of an existing and operating hydropower project shall be exempt from this subarticle, provided that:

A. The activity does not involve any dredging or filling below the normal high-water line of any great pond, coastal wetland, river, stream or brook; and

B. The activity does not involve any dredging or filling on the land adjacent to any great pond, coastal wetland, river, stream or brook such that any dredged spoil, fill or structure may fall or be washed into those waters.

§634. Permit requirements

1. Coordinated permit review. Permits required under the following laws shall not be required by any state agency for projects reviewed or exempted from review under this subarticle: Land use regulation laws, Title 12, sections 681 to 689; stream alteration laws, Title 12, sections 7776 to 7780; great ponds laws, sections 391 to 394; alteration of coastal wetlands laws, sections 471 to 478; and site location of development laws, sections 481 to 490. Notwithstanding section 634, the board may attach reasonable conditions consistent with this Act concerning the operation of hydropower projects. The board shall give written notice to the Commissioner of Inland Fisheries and Wildlife and the Commissioner of Marine Resources of the intent of any applicant for a permit to construct a dam.

Issuance of a water quality certificate required under the United States Water Pollution Control Act, Section 401, shall be coordinated for the applicant under this subarticle by the Department of Environmental Protection. The issuance of a water quality certificate shall be mandatory in every case where the board approves an application under this subarticle. The coordination function of the department with respect to water quality certification shall not include any proceedings or substantive criteria in addition to those otherwise required by this subarticle.

2. Application. An application for a permit required by section 633 shall be made on forms provided by the board and shall be filed with the board. Public notice of the filing shall be made as required by the board.

3. Application review. Within 10 working days of receiving a completed application, the Commissioner of Environmental Protection or the Director of the Maine Land Use Regulation Commission, as appropriate, shall notify the applicant of the official date on which the application was accepted.

The commissioner or the director, as appropriate, shall circulate the application among the Department of Environmental Protection, Department of Conservation, Department of Inland Fisheries and Wildlife, Department of Marine Resources, Department of Transportation, Maine Historic Preservation Commission, Office of Energy Resources, Public Utilities Commission and the municipal officials of the municipality in which the project is located. The Office of Energy Resources and the Public Utilities Commission shall submit written comments on section 636, subsection 7, paragraph F, for projects within the jurisdiction of the Maine Land Use Regulation Commission, the director may request and obtain technical assistance and recommendations from the staff of the department. The department shall respond to the requests in a timely manner. The department's recommendations shall be considered by the commission in acting upon a project application.

§635. Board decision

The board shall, within 30 days of receipt of a completed application, either:

1. Approval. Approve the proposed project upon such terms and conditions as are appropriate and reasonable to protect and preserve the environment and the public's health, safety and general welfare, including the public interest in replacing oil with hydroelectric energy. These terms and conditions may include, but are not limited to:

A. Establishment of a water level range for the body of water impounded by a hydropower project;

B. Establishment of instantaneous minimum flows for the body of water affected by a hydropower project; and

C. Provision for the construction and maintenance of fish passage facilities;

In those cases where the proposed project involves maintenance, reconstruction or structural alteration at an existing hydropower project and where the proposed project will not alter historic water levels or flows after its completion, the board may impose temporary terms and conditions of approval relating to paragraph A or paragraph B but shall not impose permanent terms and conditions that alter historic water levels or flows;

2. Disapproval. Disapprove the proposed project, setting forth in writing the reasons for the disapproval; or

3. Hearing. Schedule a hearing on the proposed project. Any hearing held under this subsection shall follow the notice requirements and procedures for an adjudicatory hearing under Title 5, chapter 375, subchapter IV. Within 45 days after the board adjourns any hearing held under this subsection, it shall make findings of facts and issue an order approving or disapproving the proposed project, as provided in subsections 1 and 2.

§636. Approval criteria

The board shall approve a project when it finds that the applicant has demonstrated that the following criteria have been met.

1. Financial capability. The applicant has the financial capability and technical ability to undertake the project. In the event that the applicant is unable to demonstrate financial capability, the board may grant the permit contingent upon the applicant's demonstration of financial capability prior to commencement of the activities permitted.

2. Safety. The applicant has made adequate provisions for protection of public safety.

3. Public benefits. The project will result in significant economic benefits to the public, including, but not limited to, creation of employment opportunities for workers of the State.

4. Traffic movement. The applicant has made adequate provisions for traffic movement of all types out of or into the development area.

5. Maine Land Use Regulation Commission. Within the jurisdiction of the Maine Land Use Regulation Commission, the project is consistent with zoning adopted by the commission.

6. Environmental mitigation. The applicant has made reasonable provisions to realize the environmental benefits of the project, if any, and to mitigate its adverse environmental impacts.

7. Environmental and energy considerations. The advantages of the project are greater than the direct and cumulative adverse impacts over the life of the project based upon the following considerations:

A. Whether the project will result in significant benefit or harm to soil stability, water quality, coastal and inland wetlands or the natural environment of any surface waters and their shorelands;

B. Whether the project will result in significant benefit or harm to fish and wildlife resources. In making its determination, the board shall consider other existing uses of the watershed and fisheries management plans adopted by the Department of Inland Fisheries and Wildlife, the Department of Marine Resources and the Atlantic Sea Run Salmon Commission;

C. Whether the project will result in significant benefit or harm to historic and archeological resources;

D. Whether the project will result in significant benefit or harm to the public rights of access to and use of the surface waters of the State for navigation, fishing, fowling, recreation and other lawful public uses;

E. Whether the project will result in significant flood control benefits or flood hazards; and

F. Whether the project will result in significant hydroelectric energy benefits, including the increase in generating capacity and annual energy output resulting from the project, and the amount of nonrenewable fuels it would replace.

The board shall make a written finding of fact with respect to the nature and magnitude of the impact of the project on each of the considerations under this subsection, and a written explanation of their use of these findings in reaching their decision.

Sec. 19. Commission on Local Land Use Violations. Swift effective enforcement against suspected violations of land use laws and ordinances is essential to the intended purpose of these statutes, but it is commonly asserted that the court system is not being used effectively, especially by small towns, to resolve these cases. There is created a Commission on Local Land Use Violations, known in this section as the "commission."

The commission shall be composed of 11 members as follows: Two members appointed by the President of the Senate, one to be a member of the Joint Standing Committee on Energy and Natural Resources and one to be a Senator knowledgeable about land use issues; 2 members appointed by the Speaker of the House of Representatives, one to be a member of the Joint Standing Committee on Judiciary and one to be a Representative knowledgeable about land use issues; and 7 members appointed by the Governor, one to be a local elected official, one to be an appointed local official, one to be a representative of the court system, one to be a representative of the Maine Association of Planners, one to be a representative of the Maine Bar Association, one to represent real estate interests, and one to be a representative of the general public, knowledgeable about land use issues. The commission shall hold an organizational meeting within 30 days after the adjournment of the Legislature at the call of the Chairman of the Legislative Council. At this meeting, the commission shall elect a chairman and a vice-chairman from within the membership.

The commission shall review the use of the state's court system to resolve suspected violations of local ordinances under the mandatory shoreland zoning laws, Title 12, chapter 424; the subdivision laws Title 30, section 4956; the state plumbing laws, Title 22, section 42; and other land use laws enforced by municipalities. This review shall examine the extent to which such local ordinances are or are not being adequately enforced, especially by small towns, where court action appears to provide the only existing appropriate recourse. The commission shall determine the causes for any problems uncovered and document examples to support its findings. The commission shall evaluate alternatives to the existing court procedures, including the establishment of a statewide system of land use hearing examiners. The commission shall make recommendations

to secure just, swift, inexpensive and effective resolution of suspected land use violation cases, especially by small towns, without creating unreasonable burdens for the state's courts system.

The commission shall report its findings, together with any suggested legislation, to the Second Regular Session of the 111th Legislature on or before January 13, 1984.

The State Planning Office and the Division of Health Engineering in the Department of Human Services shall provide staff support to the commission and administer its functions.

All executive departments are directed to give prompt assistance to the commission.

The commission may accept funds from any agency of the United States.

CHAPTER 459

H.P. 583 - L.D. 832

AN ACT to Recodify the Statutes Relating to Corrections and Mental Health and Mental Retardation.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 15 MRSA c. 409, as amended, is repealed.

Sec. 2. 22 MRSA c. 404 is enacted to read:

CHAPTER 404

PRIVATE MENTAL HOSPITALS

§1781. License; visitation; penalty

The Department of Human Services may license any suitable person to establish and keep a private hospital or private house for the reception and treatment of patients who are mentally deranged. The hospital or private house shall be subject to visitation by the department or any member thereof.

Whoever establishes or keeps the private hospital or private house without a license, or after revocation or during suspension of the license, shall be fined not more than $500.

§1782. Visitation

Each of the licensed hospitals or houses shall be visited at least once a year, and oftener if the Commissioner of Human Services so directs, by a member of the Department of Human Services, who shall carefully inspect every part of the hospital or house visited with reference to its cleanliness and sanitary conditions and who shall make a report to the department with such recommendations to improve conditions as the department deems necessary.

§1783. Revocation or suspension of license after hearing

When the Department of Human Services believes a license should be suspended or revoked, it shall file a statement or complaint with the Administrative Court Judge, designated in the Maine Administrative Procedure Act, Title 5, chapter 375. A person aggrieved by the refusal of the department to issue a license may file a statement or complaint with the Administrative Court Judge.

Sec. 3. 22 MRSA c. 405-B is enacted to read:

CHAPTER 405-B

TUBERCULOSIS SANATORIUMS

§1871. Establishment and maintenance

The State shall maintain by building, lease or by purchase one or more sanatoriums in such districts of the State as seems best to serve the needs of the people for the care and treatment of persons affected with tuberculosis. If at any time the number of persons requiring such care and treatment in these sanatoriums decreases to a level which, in the judgment of the Commissioner of Human Services, makes continued operation and maintenance of a sanatorium impracticable, the commissioner, with the advice and consent of the Governor, may close any or all sanatoriums. In the event that all sanatoriums are closed as provided, any funds from the sanatorium accounts and appropriations may, with the advice and consent of the Governor, be made available to the Commissioner of Human Services for the purpose of providing alternative treatment and care for those patients needing treatment and care. Where lease or purchase is made, the State shall have the right to enlarge or otherwise adapt the property to meet the needs of the situation. These additions or improvements shall be considered permanent. At the expiration of the original lease of any property for use as a tuberculosis sanatorium, the State shall have the right of renewal or of purchase.

Without regard to the matter of sanatorium closure, the commissioner also may purchase care for tuberculosis patients from private practitioners and private medical institutions. In making payments for care, he shall take into consideration payments that may be available through insurance or other 3rd parties.

§1872. Admission; charges

Patients may be admitted to these sanatoriums upon application to the Department of Human Services, if found to be suffering from tuberculosis or if suspected of having tuberculosis. All patients in the sanatoriums, the parents of minor children or the spouse, shall pay to the State for treatment, including board, supplies and incidentals necessary to the prescribed medical and surgical treatment both for inpatient and outpatient services, the amount determined by the department. The department may, if it finds that the patient or relatives liable by law are unable to pay the amount determined, in whole or in part, waive payment or so much thereof as the circumstances appear to warrant.

All funds collected from this source shall be credited to the General Fund. No pauper disabilities shall be created by reason of any aid or assistance given under this section.

This section does not apply to persons who may be committed under section 1022.

Sec. 4. 30 MRSA c. 13 is enacted to read:

CHAPTER 13

COUNTY JAILS AND JAILERS

SUBCHAPTER I

OFFICIALS AND PERSONNEL

§1701. Custody of jail and prisoners; jailer

The sheriff has the custody and charge of the jail in his county and of all prisoners therein and shall keep it himself, or by his deputy as jailer,

Senator FORD. Thank you. I will wait and ask both of you questions.

Mr. Fasbender.

STATEMENT OF LARRY FASBENDER, DIRECTOR, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION: ACCOMPANIED BY TIM HALL, LEGAL COUNSEL

Mr. FASBENDER. Mr. Chairman, I am Larry Fasbender, the Director of the Department of Natural Resources in Montana, and I am here representing the State of Montana today.

I appreciate the opportunity this oversight Committee has granted to us to review and to air some of the concerns that we have with the current Federal Power Act and the FERC process that we are involved in. I recognize you are pressed for time, and I have no intention of going through in detail the information that we have presented to you.

I think however it is necessary to highlight in a couple of instances some of the things that we think are extremely important for you to consider when you address the amendments to the Federal Power Act.

We agree with you that the concerns are not just the concerns of the western States but also are concerns of all of the States, or a number of the States in the east also. I was very surprised and pleased in communicating with them that they also have had some difficulties in dealing with FERC under the way it is currently constituted.

In 1920 when the Federal Power Act was originally passed I think it was very clear that it was the intent of Congress at that time to defer to State water law in any decisions that would be made by the Federal Energy Regulatory Commission. *First Iowa* we think in correctly changed that relationship, or that intent of Congress. Quite simply, that is what we are here today to try and address, to return it to what was the original intent when Congress passed the Federal Power Act in 1920.

We, as have other States, encountered serious problems in dealing with the management of our water resources. We think that it is extremely important that if something is going to be decided about the destiny of Montana or any other State, that the decisions should be made by the States and not by the Federal Government.

Water is vitally important to the western States. Montana, as well as a number of other States, are currently involved in adjudicating those rights that are currently in existence. We have elaborate and sophisticated mechanisms for permitting additional water to be used. It is a scarce resource. It is an extremely valuable commodity, and to have the FERC process set up as it is now being able to come in and interfere and create havoc with our management plans creates a dual management system that I do not think has ever been used or recognized in any other instance as far as the Congress is concerned or the courts.

When it comes to the adjudication of water rights, traditionally the Federal Government and the courts have always deferred to the States to handle that process so that we do not have two court systems working to determine what those rights are. I do not think

that the situation should be any different as far as the FERC process is concerned.

We think that it is extremely important that it be clarified what the roles of the State and the Federal Government are in this instance. Again I would stress that we think it is an overriding concern of the States that they would be the ones to make the determination as to how that water is managed.

We think that it is possible within the confines of the Federal Power Act to adjust and adapt to the various problems that you have raised today. In the instance where you have multiple applications that may be made for the same project, we feel that Montana law, while it is the same as Idaho's, it would be possible to make an assessment as to whether or not water is available for use by a hydropower plant and set out the limits of it, and then still allow FERC to make the determination as to who would get the permit to develop that water.

We think that we should have the right to develop the conditions and the constraints that would be imposed upon the use of that water. If the use of that water were to be restricted during irrigation season, that would be a condition that would be imposed in advance, the economic decisions made on the operation of it, how that would be handled, and that would then be up to FERC to issue the license with those conditions in place.

I think that it is possible, if FERC is willing to work with us, to accommodate a lot of the problems that you might have. Our problem is that when we have dealt with FERC in the past, while we have received ample notification, while we have been given the opportunity to intervene, it really has made it extremely difficult for us to do that.

In one instance in a case currently pending before FERC, approximately $900,000 has been spent just on the intervention process. We still have not at this point received any determination by FERC as to what the disposition of that application is going to be.

Under Montana's current law and under the FERC application process we do not have any power at all to be able to go in and require that the applicant would provide the funds for studies that have to be done and the intervention work that would have to be done. As funds are extremely tight, it is difficult for the State to intervene in that process without having some sort of leverage to require the applicant to pay for the studies that would be made.

If we are going to be involved in the process as it is now, it is important that we have some sort of a mechanism set up whereby we could assess those fees and do the studies necessary to determine just what the effect of the applicant would be on the resources that the State of Montana has.

I guess I in conclusion would say that it simply is a States' Rights problem. It is a determination as to the process, as to whether or not the States are going to make the decisions about the destiny or whether the Federal Government is.

[The prepared statement of Mr. Fasbender follows:]

STATE OF MONTANA'S TESTIMONY
BEFORE
THE SENATE ENERGY COMMITTEE ON ENERGY AND NATURAL RESOURCES
HEARING OF SEPTEMBER 12, 1986

I am Larry Fasbender, Director of the Montana Department of Natural Resources and Conservation, representing the State of Montana. Thank you for this opportunity to testify. With me is Tim Hall, legal counsel for the Department.

The reason for our appearing today is quite simple. Montana seeks to regain state control over its water resources. Congress recognized and retained federal deference to state water law when the Federal Power Act (FPA) was enacted in 1920. However, the Supreme Court in its infamous First Iowa decision ignored Congress' original intent. Today, as a result of First Iowa and subsequent court decisions, state water law is generally ignored in Federal Energy Regulatory Commission (FERC) exemption or licensing proceedings held pursuant to the Federal Power Act.

Montana is requesting Congress to examine and resolve the many problems caused by the Supreme Court's misinterpretation of the Federal Power Act in First Iowa. We seek to return the Federal Power Act to what Congress originally intended. Montana's proposed remedy to these problems is to amend the Federal Power Act so that states can control their water resources and so state water law is not preempted by FERC in its hydropower licensing proceedings.

The First Iowa Decision

Sections 9 and 27 of the Federal Power Act require FERC hydropower license applicants to comply with state water law. Despite that clear language in the Federal Power Act, the Supreme Court in its First Iowa decision, 328 U.S. 152 (1946), and in subsequent decisions, held that this language indicated that only vested rights, i.e., those property rights already granted pursuant to state law, could not be taken away because of a FERC license without just compensation. The history of the Federal Power Act acknowledging Congress' intent to defer to state water law as to the appropriation of water was completely ignored. This interpretation effectively repealed those sections of the FPA mandating deference to state water laws. This is the heart of what we are trying to resolve here today.

Montana's Present Problems

Montana's need for effective control of water allocation becomes more critical as the demand for limited water supplies increases. Demand for water resources by small scale hydro developments increased dramatically after the energy crisis of the 1970's and subsequent PURPA and federal tax incentives for renewable energy developments. Partly because of this growing demand for limited water supplies, Montana over the years has developed a sophisticated water management system attuned to Montana's water resources and water needs. However, Montana's efforts to resolve increasingly complex water allocation problems are continually frustrated by the present Court interpretation of the Federal Power Act.

In Montana, FERC has granted hydropower licenses and exemptions for hydropower projects when no state water right has been obtained or even applied for. This has been done in spite of FERC's own regulations that require a showing by applicants that they are in the process of obtaining the necessary state water rights. The problem becomes quite apparent. Montana cannot adequately control or plan water use in the state because once the applicant receives a FERC license state law is effectively superseded and the applicant has a right to use the water for hydropower.

FERC has other regulations that, on their face, require FERC to recognize state concerns. These regulations are ignored. In reality the FERC process has become a steamroller over state water laws with inadequate opportunity for the airing of state concerns.

Intervention

The only avenue for states to assure their concerns are represented is to intervene in FERC proceedings. Montana has done so in the past, but for a sparsely populated state such as Montana so far from Washington, D.C., that is inordinately expensive and time consuming. Montana's intervention in the Northern Lights case awaiting decision by FERC has so far cost $898,000. The difficulties involved in intervening are compounded by the large number of cases pending before FERC.

Even if we intervene in the FERC proceedings, Montana has no assurance that FERC will have an appreciation for, or adequately address, our state concerns during the hydropower licensing process. For example, one of Montana's interventions actually became lost in the vast FERC bureaucracy. At one point during our intervention in proceedings involving the Montana Power Company's application at Thompson Falls, we asked FERC to tell us the status of our intervention and what were our next steps in FERC's process. FERC first told us that no record of our intervention could be found. After insisting that we had timely and properly intervened, FERC finally phoned and told us that, yes, our intervention had been found. This intervention had been going on for four years with no actions on the part of FERC to keep us informed. We are just now finding out how to proceed. This exemplifies why Montana and other states are frustrated by little or no FERC follow-up regarding their concerns and are skeptical their concerns will ever be addressed by FERC. A related concern is that besides lacking an appreciation of local concerns, FERC is understaffed to monitor all the projects it licenses and any conditions it imposes on licenses.

Instream Flows

A serious concern to Montana is that FERC has been mandating minimum instream flows downstream of hydropower projects in total disregard of state water law. Montana water law provides a state water reservation process or a state permit process as

the legal means to establish new instream flow rights. The Vermillion Creek project in Montana where a FERC exemption was granted is an example of where FERC has required minimum stream flows below a dam. This was done without consultation with Montana's water management agency and without consideration or recognition of Montana's law. Although the project was never finished, it still serves as an important example of FERC's disregard of Montana's water laws providing for instream flows.

Environmental and Social Impacts

Many hydropower developers point out that their water use is non-consumptive as if that means hydropower use does not create any negative impacts. That characterization, however, misses the point that hydropower development can result in the total appropriation of a stream. Future appropriators upstream of a hydropower development can be permanently deprived of ever having the consumptive use of water to irrigate their crops. Montana's water law takes this into account and does not automatically allow an entity to appropriate an entire watershed. With FERC in total control as it is today, Montana has absolutely no assurance that future hydropower dams will not foreclose all future upstream consumptive uses on many streams in the state. These decisions that profoundly affect Montana are being made in Washington, D.C., without knowledge of the local problems, yet we in Montana are left to live with the effects of these decisions for generations to come.

FERC's Preliminary Permits

Another problem facing Montana is that the Federal Power Act allows developers to apply first for a preliminary permit prior to receiving a FERC license. An applicant that receives a preliminary permit is able to maintain priority over other applicants for the site and conduct necessary studies. A preliminary permit effectively locks up the site for that applicant. When a state raises substantive issues at the preliminary permit stage, FERC dismisses them as being irrelevant by arguing that the preliminary permit phase authorizes only studies, not construction. This precludes any state concerns from being considered at the preliminary permit stage. Montana feels its input at the preliminary stage is critical because that is where the project plans are formulated and the environmental impacts and mitigation of those impacts are analyzed. Despite FERC's own requirements to the contrary that require developers to coordinate with all appropriate state agencies, FERC has never assured that this happened with projects in Montana.

Major Hydropower Projects

Another important Montana concern is FERC's decision-making process for permitting major hydropower projects and FERC's analysis and treatment of environmental impacts. In Montana, the siting of major energy facilities is a state responsibility subject to a state siting act. We site every other type of energy facility except hydropower. State siting of

hydroelectric power projects is preempted by the Federal Power Act. This leaves Montana with little or no input into FERC's licensing process, yet the environmental, economic and social impacts of such developments remain with us. Although we have mechanisms in place under our own law for environmental assessment and mitigation, FERC makes no attempt to coordinate its environmental analysis with that of Montana. Currently, it is impossible to assure that state studies are considered as part of the federal decision. Quite often, by the time a state conducts its environmental studies, FERC has already made a decision into which we had, in effect, no input. This naturally results in costly and duplicative environmental studies being done during unrelated time frames.

Since costly intervention is the only means of participating in a FERC decision, Montana either needs to recover its costs of study and intervention from the developer or forego presenting any of its concerns before FERC. In fact, a major potential hydropower developer in Montana informed us that it would not pay the siting fees mandated under Montana's siting act for a hydro facility. They said that the Federal Power Act preempted Montana from collecting any fees to evaluate the environmental impacts of a hydroelectric facility under our siting act. The developers said they would litigate the issue prior to submitting to any such state process. This means Montana would be left entirely out of the FERC process unless the Federal Power Act is amended as we propose to make it clear that it is permissible for states to assess FERC applicants a

fee that can be used to study a proposed hydropower project. In absence of our proposed amendments, all decisions on projects in Montana will be made in Washington, D.C., with all the impacts taking place in Montana.

Montana's Proposed Amendments

Montana seeks a reasonable solution to the present problems. We are not proposing to place all decisions regarding hydropower development with the states. We recognize a "national interest" still needs to be served by FERC review. In some instances FERC may not want navigation on a stream impeded by a dam although a state water right has been secured. On the other hand, we do not believe the problems we pointed out can be cured administratively by FERC. FERC's dismal track record in addressing state concerns is frustrating--more is needed than mere promises from FERC that state concerns will be heard. To date all we have received from FERC is promises. In fact, FERC's latest revised regulations merely incorporated prior FERC decisions and clarified existing practices. This does not address any of the concerns we are raising today. FERC's new regulations only perpetuate the current problems.

Montana's proposed solution to these problems is to have the Federal Power Act amended to reflect Congress' original intent so that compliance with state water law is required. We seek to return to the states what was taken away in First Iowa and other decisions. Under Montana's proposed amendments, compliance with state water law would be a condition of a FERC license. Only

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then would states be free from FERC's discretionary allocation of water in disregard of state law. Developers would know in advance that compliance with state water law is mandatory so this should not create any problems.

Montana's proposed amendments also make it clear that even though state siting acts are preempted, hydropower developers must pay for state intervention studies. By requiring prior compliance with state water law and payment of state study fees, we would be assured that our environmental studies would be reviewed and used during any FERC licensing proceedings. This would give the states a real voice in ultimate FERC decisions that impact the states. Duplicative costs for studies would not be a problem because states and FERC could coordinate studies.

I have attached a list of the amendments that Montana is proposing this Committee consider as part of its amendments to the Federal Power Act by S. 426. (See Attachment A). I would like to briefly summarize them. The referenced sections refer to "Montana's Proposed Amendments to the Senate Energy and Natural Resources Committees Joint Staff Compromise Amendments in the Nature of a Substitute for the Wallop-Johnston Substitute, November 1, 1985." Sections 12-15 are original to Montana and/or the Western States Water Council and are not part of the Committee's proposed amendments to S. 426.

a. Montana's amendments to the Committee's Section 3 amending Section 10 of Federal Power Act, "Conditions of Licenses Generally," requires proof of acquisition of a water right in conformance with applicable state law. This

requirement already exists in Sections 9, "Information to Accompany Application for license," and Section 27, "State Laws and Water Rights Unaffected." This amendment would make Section 10 of the Federal Power Act consistent with Sections 9 and 27.

b. The Committee's amendments require FERC solicitation and consideration of comprehensive Federal or State plans regarding the waterway, Federal and State agency and affected Indian tribes' recommendations for license issuance or conditions, and explanation in writing of its reasons for rejecting or modifying any conditions proposed by other state or federal agencies or Indian Tribes. Montana's proposed amendments add facility siting and water management agencies to those agencies that FERC must consult. It also requires an explanation from FERC when it rejects or modifies any conditions proposed by the state to be included in the FERC order issuing a license.

c. Montana's Section 12 amends Section 9, "Information to Accompany Application for License" (16 USC § 802), to clarify that the Federal Power Act does not preempt state water laws. Section 12 of S. 426 adds a section to the Federal Power Act that "nothing therein shall be construed to authorize the appropriation of water or alter or establish any state, federal, or private water related rights." This is insufficient to overcome prior court interpretation of the Federal Power Act. The current language in Section 27 (16 USC § 821) is already stronger

than the S. 426 language. Section 12 of Montana's amendments completely replaces the Committee's Section 12. Montana proposes to amend Section 9 to state the Commission shall not issue an original or new license, amendment to a license, or exemption from licensing unless the applicant, through the license application, proves acquisition of the necessary state water rights.

d. Montana's Section 13 amends Section 21 of the Federal Power Act (16 USC § 814) to repeal FERC's authority to authorize licenses to condemn water rights. A license applicant would be governed by applicable state law and procedure in all condemnation actions for water rights.

e. Montana's Section 14 adds to Section 27 of the Federal Power Act, "State Laws and Water Rights Unaffected" (16 USC § 821), the need for a license applicant to comply with State substantive and procedural laws, including the assessments of fees, and declares that such compliance is not an undue burden on interstate commerce.

f. Montana's Section 15 adds language to Federal Power Act Section 6 (16 USC § 799) that declares the Commission is not empowered to include in any of its authorizations any terms or conditions inconsistent with the terms and conditions established pursuant to state law for the use and appropriation of water for the project. Since Montana provides for obtaining instream flows under state water law and otherwise conditioning water rights as it determines necessary, FERC conditions in this area would not be necessary or appropriate.

CONCLUSION

Congress recognized and retained federal deference to state water law when it enacted the Federal Power Act. Unfortunately, courts misinterpreted that intent and the result is that states are now powerless to require compliance with their water laws. Complex water allocation decisions are now made by FERC in Washington, D.C., rather than by the affected states. Similarly, decisions concerning siting and environmental, social and economic impacts are also made in Washington, D.C., with little input from the affected states.

Montana proposes these amendments to require compliance with state water law as Congress originally intended. Montana proposes additional amendments to help assure it will have the opportunity to prepare and present its studies before FERC so state concerns can be properly considered.

The Committee's amendments to the Federal Power Act in S. 426 do not go far enough to satisfy Montana's needs because those amendments only require consideration of state concerns, and do not require compliance with state water laws as originally intended by Congress when it enacted the Federal Power Act.

Montana respectfully submits to the United States Senate its proposed amendments for the purpose of providing a reasonable solution to a critical problem.

ATTACHMENT A

MONTANA'S FEDERAL POWER ACT AMENDMENTS

MONTANA'S PROPOSED AMENDMENTS TO THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE'S "JOINT STAFF COMPROMISE" AMENDMENTS IN THE NATURE OF A SUBSTITUTE FOR THE WALLOP-JOHNSTON SUBSTITUTE

SEPTEMBER 6, 1986

(The following is the proposed Joint Staff Compromise. Montana's amendments to the compromise are presented in FULL CAPS. The Committee's proposed amendments are underlined.)

Strike everything after the enacting clause and insert the following:
That this Act may be referred to as the "Electric Consumers Protection Act of 1985."

Sec. 2. Sec. 7(a) of the Federal Power Act [16 U.S.C. 800 (a)] as amended, is further amended—

(a) by inserting "original" after "hereunder or"; and

(b) by striking "and in issuing licenses to new licensees under section 13 hereof".

Sec. 3. Section 10 of the Federal Power Act, as amended is further amended—

(a) after "water-power development," by inserting "for the adequate protection, mitigation, and enhancement of fish and wildlife,";

(b) after "including", by inserting "irrigation, flood control, water supply and";

(c) by AMENDING SUBSECTION (a) TO READ:

"(a) CONFORMANCE WITH STATE WATER LAW THAT THE LICENSEE HAS ACQUIRED, IN ACCORDANCE WITH THE SUBSTANTIVE AND PROCEDURAL PROVISIONS OF STATE LAW, THE NECESSARY RIGHTS ESTABLISHED PURSUANT TO STATE LAW TO APPROPRIATE, DIVERT AND USE WATER.",

BY redesigning existing subsection (a) as paragraph (ab)(1) and by inserting the following new paragraphs:

"(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (ab)(1), the Commission shall consider:

"(A) the extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing or conserving a waterway or waterways affected by the project that is prepared by:

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; and

(ii) the State in which the facility is or will be located; and

(B) the recommendations of Federal and State agencies exercising administration over WATER MANAGEMENT, FACILITY SITING, fish and wildlife, flood control, navigation, irrigation recreation and cultural resources of the State in which the project is located, and the recommendations of Indian tribes affected by the project;

"(3)(A) Upon receipt of an application for a license, the Commission shall solicit recommendations for proposed terms and conditions to be included in the license from the STATE AND FEDERAL agencies and Indian tribes identified in paragraph (a)(2) of his section.

"(B) If any recommendation for a proposed term or condition is received by the Commission at least 30 days prior to issuing any licenses under this section, the Commission shall explain in ITS ORDER ISSUING ITS LICENSE ~~writing~~ its reason for rejecting or modifying any such proposed term or condition.".

Sec. ~~3~~ 4 . . .

Sec. ~~4~~ 5 . . .

Sec. 6 . . .

Sec. 7 . . .

Sec. 8 . . .

Sec. 9 . . .

Sec. 10 . . .

Sec. 11 . . .

SEC. 12. SECTION 9 OF THE FEDERAL POWER ACT IS AMENDED BY:

(a) STRIKING FROM THE FEDERAL POWER ACT'S PRESENT SUBSECTION 9 (B) THE FOLLOWING LANGUAGE ". . . AND TO THE APPROPRIATION, DIVERSION, AND USE OF WATER FOR POWER PURPOSES . . ."

(b) BY ADDING THE FOLLOWING NEW SUBSECTION:

"(d) NOTWITHSTANDING ANY OTHER PROVISIONS OF LAW, THE COMMISSION SHALL NOT ISSUE AN ORIGINAL OR NEW LICENSE, AMENDMENT TO A LICENSE, OR EXEMPTION FROM LICENSING UNDER THIS PART, UNLESS THE APPLICANT PROVES ACQUISITION, IN ACCORDANCE WITH SUBSTANTIVE AND PROCEDURAL PROVISIONS OF STATE LAW, OF THE NECESSARY RIGHTS ESTABLISHED PURSUANT TO STATE LAW TO APPROPRIATE, DIVERT, AND USE WATER."

SEC. 13. TO SECTION 21 ADD THE FOLLOWING NEW SENTENCE: "THE COMMISSION IS NOT EMPOWERED TO AUTHORIZE A LICENSEE TO EXERCISE THE POWER OF EMINENT DOMAIN PURSUANT TO THIS SECTION FOR THE PURPOSE OF ACQUIRING WATER RIGHTS."

SEC. 14. IN SECTION 27, DESIGNATE THE EXISTING SENTENCE AS SUBSECTION (a) AND ADD THE FOLLOWING ADDITIONAL SUBSECTIONS:

"(b) NOTHING IN THIS PART SHALL BE CONSTRUED AS CONFERRING UPON THE UNITED STATES, ITS AGENTS, PERMITTEES, OR LICENSEES ANY RIGHT TO ACQUIRE RIGHTS TO APPROPRIATE, DIVERT, OR USE WATER.

(c) APPROPRIATION OF WATER FOR PURPOSES SUBJECT TO THIS PART SHALL BE PURSUANT TO SUBSTANTIVE AND PROCEDURAL PROVISIONS OF STATE STATUTORY LAW, DECISIONAL LAW, AND REGULATIONS GOVERNING THE APPROPRIATION, DIVERSION AND USE OF WATER, AND THE PAYMENT OF REQUISITE STATE FEES NEEDED TO EVALUATE THE APPROPRIATION.

(d) ESTABLISHMENT OF, AND COMPLIANCE WITH, PURSUANT STATE LAW, TERMS OR CONDITIONS, INCLUDING LICENSES, OR OTHER ENTITLEMENTS FOR APPROPRIATION, DIVERSION, OR USE OF WATER SHALL NOT BE DEEMED TO CONSTITUTE A BURDEN ON INTERSTATE COMMERCE.

(e) NOTHING IN THIS PART SHALL ALTER IN ANY WAY ANY PROVISION OF STATE STATUTORY LAW, DECISIONAL LAW, OR REGULATIONS, OR OF ANY INTERSTATE COMPACT, GOVERNING THE APPROPRIATION, DIVERSION, OR USE OF WATER."

SEC. 15. TO SECTION 6 ADD THE FOLLOWING PROVISION AFTER THE SECOND SENTENCE: "THE COMMISSION IS NOT EMPOWERED TO IMPOSE ANY TERMS OR CONDITIONS IN ANY ORIGINAL OR NEW LICENSE OR AMENDMENT TO LICENSE WHICH ARE INCONSISTENT WITH THE TERMS AND CONDITIONS ESTABLISHED PURSUANT TO STATE LAW IN ANY PERMIT, LICENSE, OR OTHER ENTITLEMENT FOR APPROPRIATION, DIVERSION, OR USE OF WATER FOR THE PROJECT AUTHORIZED BY THE LICENSE OR AMENDMENT."

Senator FORD. Thank you, sir.

Ms. Massey, at what point would you allow FERC to issue a license in your State?

Ms. MASSEY. Well, our proposal was to continue to allow FERC to issue the license, but that that license needed to be consistent with the State's comprehensive plan. We feel that they are not currently implementing their responsibilities under section 10(a) of the Federal Power Act to prepare a comprehensive plan.

In the absence of such a plan, the State has developed its own. We merely ask FERC to use that plan and to make their decisions consistent with that plan. If there were some overriding Federal interest of defense or something like that that would interfere with compliance with that plan, I think that the law could accommodate that. But I think absent those situations, the decision should be made consistent with the State's comprehensive plan.

Senator FORD. I understand States' Rights, having been a Governor. I understand that very well. I used to have to fight for it continually. One of the biggest problems I found was that Federal law was passed and those who were implementing the law interpreted it somewhat different from the concept of those who introduced the legislation and got it passed. You had to come back and explain it to some of the Congressmen and Senators as to what was really happening down at grassroots compared to the intent up here.

But it seems to me, now that I am up here, that you are asking for 50 separate procedures, and those 50 separate procedures all have to fit into an application from each one of the States; and once the applicant conforms to the State, then FERC can make a decision whom to give it to. Why don't you just make the decision whom to give it to and get accused of giving political patronage?

Ms. MASSEY. We are happy to make the decision of who to give it to. We do. We have a permitting proceeding at the State level.

Senator FORD. Well, sure. Every State does. You have your permanent permitting situation, have you not, all of them? Don't all the States? I thought Mr. Dunn from Idaho said they have a preliminary permitting situation where they ask for certain things and people have to file with them and the first one through the door is the first one to get it. Do you do the same thing?

Ms. MASSEY. We have a somewhat different system.

Senator FORD. Wait just a minute now. Do you have a somewhat different situation in Montana?

Mr. FASBENDER. No. We have a——

Senator FORD. The first one through the door gets it?

Mr. FASBENDER. As far as the water rights are concerned, that is correct. We also have a Facilities Siting Act in Montana that we think has been preempted by the Federal Power Act, but I think your suggestion is a good one. We feel that we are perfectly competent to make the decisions as far as the siting of those hydropower plants in Montana with our current law. We have a process in place that would handle that.

Senator FORD. How would you feel if the State next to you who has the Ohio and the Mississippi, and Green, and Tennessee, and Cumberland all flowing through its State, and they just stuck those little hydros out there and just fired that electricity over to you, that energy over to you, and some people in your State want the

water and want to file for hydroelectric? So the State right across the way are just firing applications up here to make it real easy for the applications to be approved on a State level, and FERC just kept firing those things, would you like that procedure?

Mr. FASBENDER. I think that back in 1920 when the Federal Power Act was——

Senator FORD. Henry Ford filed the first suit to be compensated, too. So let us go from there. I understand the history of it.

Mr. FASBENDER. I think things have changed since then. We are right now in the process of negotiating in the Missouri Basin States as to how the management of the Missouri River is going to take place.

I am perfectly willing to work out any problems that I have as far as how other States are going to do in the development of hydropower, irrigation, municipalities, anything else with those other States, rather than having the Federal Government come in and make those decisions without really consulting with any of us.

Senator FORD. I thought the law said that they had to consult with you.

Mr. FASBENDER. I think the law says that they are required to have compliance before the permit is issued.

Senator FORD. I thought they notified you, that various agencies were notified when the application was filed, even when the preliminary work was done you were notified.

Mr. FASBENDER. We are notified, and once we are notifed that is generally the last we hear of it for sometime.

Senator FORD. Well, we will find out if FERC agrees with that when they get on. That is the reason they are last, so they can rebut some of these statements, or give us the reasons why.

Let me get back to you just a minute. Tell me about Maine's variations. It kind of slipped over here, and I apologize.

Ms. MASSEY. It is probably similar to their Facilities Siting Act. We have a Maine Waterway Development and Conservation Act permit that allows all of the agencies in the State, and public interest groups and private citizens to come in in a proceeding and present evidence on whether they think a specific hydrpower project should be approved, and what conditions should be placed on that approval. We have a board appointed by the Governor that makes a decision and is required to make that decision based on a number of criteria in the statute that allows them to determine what is the overall public benefit to the people and to the State of Maine from the use of that waterway, and to accommodate the interests of fisheries, recreation, flood control, et cetera.

FERC actually had I think some good points in terms of how the Maine legislation might be modified from the currently introduced bill to deal with the specific issue you raised about conflicts between States. First of all, we would propose that the State present its comprehensive plan to FERC in accordance with some guidelines FERC worked out.

Then, FERC would have an opportunity to approve or to come back to the State and say this is not consistent with those guidelines. Then once you had an approved plan, I think at that stage other States that had an interest in rivers that flowed through your State would have an opportunity to comment, and there could

easily be a mechanism for working out any of those conflicts and developing regional plans or consistent State plans that would then be adhered to.

Senator FORD. Should the guidelines be statutory, or regulatory?

Ms. MASSEY. I suppose regulatory. That is like the Coastal Zone Management Act.

Senator FORD. Should they be part of the River Basin Plan?

Ms. MASSEY. Could you elaborate a little bit? Exactly what do you mean?

Senator FORD. Well, FERC was planning on starting a River Basin Plan, as I understand it. Should all those guidelines all be put in together to come together?

Ms. MASSEY. I think that makes sense. We do that with some of our own State permitting procedures. We require consideration of cumulative impacts of projects, and now Maine has a quarter of the relicensings of the entire country over the next five years.

We are asking all of our State agencies to look at all of the projects on a basin in making their comments on any individual projects.

Senator FORD. How many applications for new permits have you had in the last five years? Just give me a ballpark figure; I don't care if you miss it by 100. Just give me some figure. Around here we just reach up and grab one.

Ms. MASSEY. I do not know for preliminary permits. For permits that have gone beyond that stage, it is going to be ballpark, but——

Senator FORD. Well, that is called Gramm-Rudman around here. Go ahead.

Ms. MASSEY [continuing]. I would say 40. 40.

Senator FORD. 40? How many have been granted?

Ms. MASSEY. In the twenties.

Mr. FASBENDER. About half of them?

Ms. MASSEY. Yes. A lot of the others are pending, or they were dropped. We grant most of our permits.

Senator FORD. What size are they?

Ms. MASSEY. They vary in size. They are on the smaller size, from very small up to about 45 megawatts.

Senator FORD. What about Montana, then? How many permits have you all had in the last five years?

Mr. FASBENDER. I do not know the precise number. As you said, we could pull a number out of the air here. I would guess around only 10 or 12.

Senator FORD. How many have you issued?

Mr. FASBENDER. How many permits have we issued?

Senator FORD. Of the 12 applicants, how many permits?

Mr. FASBENDER. Have we approved? I really do not know. Do you have any idea?

Mr. HALL. Mr. Chairman, I am Tim Hall.

My understanding is that there are many, many cases pending before FERC. The actual number that has been granted is only three or four at this point.

Senator FORD. In the last five years?

Mr. HALL. Yes. But there are many, many pending in Montana right now.

Senator FORD. Are most of them just paper filings, just to kind of get in on the ground and be there? Just so they have their nose under the tent?

Mr. HALL. I think it is too early to tell at this point.

Mr. FASBENDER. I think I would agree with you, Senator, that there probably are a lot of those that were just filed when the energy crisis came along that they came in and requested permits to develop hydropower sites thinking that there was going to be a great demand and an increase in the price of electricity, which of course has not happened.

Senator FORD. John.

Senator MELCHER. Well, I think Senator Ford's last question is one that concerns us. These filings are before FERC, and we do not know how many there are. The last time I looked, several years ago, there were several hundred. It looked like it was going to get up to a thousand. It is ridiculous. We do not know what is meant by a company in Massachusetts filing 88 in one whack. We do not know what that means. It means chaos if they were pursued. Maybe FERC can clarify how many pending applications they have got.

The point is clear that what our interest in Montana is who has control of the water. We think it has to be under a State process or we are nowhere.

I am happy that you have testified, Larry, on the need for this clarification. We will be discussing it with the FERC witness when he gets here.

Senator FORD. I do not have any further questions. We thank you for being here.

The next witness is the Acting General Counsel for the Federal Energy Regulatory Commission, and I hope you are ready.

Chris, we are going to have to do similar to what we did earlier. I have a 11:15 meeting I have to get to, and Senator Melcher has agreed to stay through your testimony. We are grateful, and we will be submitting some questions to you.

I would hope that you could, for the record, so that we could persue it then shortly, answer some of the problems that have been posed here today. I am concerned, and I think the young lady from Maine probably gave the most accommodating statement, that there should be a way to coordinate and have guidelines set up to let States adhere to that, and then when the States submit an application you know that those guidelines have been met and you could go on with your procedure as to which licensee you would want to support.

I do think that we have to have some coordinated effort. If not, we are going to have 50 different problems. As I said, we can talk about the Ohio and the Mississippi, and the Tennessee, and the Green, and the Cumberland, and Kentucky, and all of them are navigable streams, that sort of thing. We have just all kinds of water. We are lucky to have it and we are tickled to death it is there.

As I say, we have got them running all over the place trying to file. They are filing for the same place. Kentucky River locks are being closed. That is an ideal place to drop right in and go to work. So I do not want them to feel like they are the Lone Ranger.

STATEMENT OF CHRISTOPHER J. WARNER, ACTING GENERAL COUNSEL, FEDERAL ENERGY REGULATORY COMMISSION; ACCOMPANIED BY FRED E. SPRINGER, DIRECTOR, DIVISION OF PROJECT MANAGEMENT, OFFICE OF HYDROPOWER LICENSING

Mr. WARNER. Mr. Chairman, I do appreciate your comments and the comments of Senator Melcher.

I am Chris Warner. I am the Acting General Counsel of the FERC. I am accompanied by Fred Springer, who is the Director of our Division of Project Management at the Office of Hydropower Licensing.

I would like to submit my statement for the record, if I could, and then try to in an informal sense respond and discuss and maybe shed some light on some of the issues raised by the earlier witnesses. So I would like to submit my statement for the record at this time.

Senator MELCHER [presiding]. Yes. That would be fine, Mr. Warner. Your entire statement will be made part of the record.

I think you realize the two areas of our concern, and we do appreciate you directing your oral comments directly to those.

Mr. WARNER. Yes, sir.

We still are of the opinion that the *First Iowa* line of cases is good law. Under those cases, and under the interpretation of the Federal Power Act, specifically section 10(a), the Commission is delegated jurisdiction that is broad in terms of the application of the 10(a) standard, the comprehensive plan standard, to the licensing of hydroelectric projects.

At the same time, we do recognize that the Congress does have the ability to affect our jurisdiction, to restrict it, to modify it, and of course if Congress did so choose for example to adopt the amendments proposed today, the Commission would carry out the jurisdiction Congress gives it.

I think the real issues today deal with procedures and coordination and communication and notification. I think it is important to look at the situation as we find it now with hydroelectric projects, specifically preliminary permits, applications for licenses, and applications for exemptions.

In June of 1985, in recognition of some of the issues raised as to consultation between applicants for licenses and preliminary permits and relevant State resource agencies, the Commission did adopt new procedures applicable to the filing of preliminary permit applications and license applications, as well as exemption applications.

Specifically, the Commission's regulations implemented a new three-stage agency consultation procedure for licenses and exemptions from licensing. In those procedures, applicants are required to contact all appropriate agencies and provide each of them with a specific detailed set of information to the extent available concerning the project, including maps, engineering design, operational mode, affected environmental resources and mitigation, and stream flow data.

The agencies that are required to be consulted do include the State water resource agencies, and of course other relevant State

agencies such as the fish and wildlife agencies, health agencies, and other environmental agencies.

[The prepared statement of Mr. Warner follows:]

STATEMENT OF
CHRISTOPHER J. WARNER, ACTING GENERAL COUNSEL
FEDERAL ENERGY REGULATORY COMMISSION
BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

September 12, 1986

Mr. Chairman and members of the Committee:

I appreciate this opportunity to appear before you, in response to Chairman McClure's request of September 4, 1986, at this oversight hearing on the consideration of applicable water law during the Federal Energy Regulatory Commission's hydroelectric licensing proceedings. While my comments here today represent my views and not necessarily those of the Commission, I hope my statement will be helpful to the Committee.

The Federal Energy Regulatory Commission (formerly the Federal Power Commission) regulates the development of non-federal hydroelectric projects that are subject to Congress' Commerce Clause and Property Clause jurisdiction. These projects comprise about half of the Nation's developed hydroelectric power capacity.

The Federal Water Power Act of 1920, amended and recodified in 1935 as Part I of the Federal Power Act (FPA), embodies two basic objectives: to help meet the Nation's growing demand for electric power by facilitating the development of hydroelectric power, and to protect the public interest in the use of valuable national resources -- streams affecting interstate commerce and federal lands -- to develop such power.

The Commission has the exclusive jurisdiction to authorize non-federal hydroelectric projects that

- are on navigable waters of the United States:
- are on non-navigable waters over which Congress has Commerce Clause jurisdiction, were constructed after 1935, and affect interstate or foreign commerce;
- are on the public lands or reservations of the United States (excluding National parks and monuments); or
- utilize the surplus water or water power from any federal dam.

The Commission grants three forms of authorization with respect to hydroelectric development:

Preliminary Permit

A permit, issued for up to a statutory maximum of three years, maintains priority of application for license while the permittee studies the site and makes the financial arrangements necessary to apply for a license. States and municipalities are given a statutory preference in securing a preliminary permit. A permit does not authorize any project construction. Obtaining a permit is not a prerequisite to applying for or receiving a license for the site.

License

A license is issued for up to a statutory maximum of 50 years. The license cannot be unilaterally altered or terminated. Licenses are to be issued only for projects that, in the Commission's judgment, will be best adapted to a comprehensive plan for improving or developing a waterway for beneficial public purposes, pursuant to Section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a). This requires the Commission, when deciding whether and under what terms to license a project, to explore all issues relevant to the public interest. (Udall v. Federal Power Commission, 387 U.S. 428 (1967).) Typical, and sometimes competing, uses of a waterway include hydroelectric power, irrigation, flood control, navigation, fish and wildlife preservation, and recreation.

In situations involving an initial license when no preliminary permit has been issued, states and municipalities have a statutory preference. The Commission has held that this preference does not overcome the priority of application accorded to one who files a license application pursuant to his preliminary permit.

Exemption

The Commission has been empowered to exempt from some or all of the licensing requirements of Part I of the Federal Power Act certain categories of hydroelectric projects:

- hydroelectric facilities under 15 MW using a man-made conduit operated primarily for non-hydro purposes ("conduit exemptions"), pursuant to Section 213 of the Public Utility Regulatory Policies Act of 1978.
- hydroelectric power projects of 5 MW or less using an existing dam or natural water feature ("5-MW exemptions"), pursuant to Section 408 of the Energy Security Act of 1980.

Both types of exemption are subject to the mandatory conditioning authority of the U.S. Fish and Wildlife Service and comparable state agencies with respect to the mitigation of project impacts on fish and wildlife resources.

In contrast with a license, an exemption does not confer the federal power of eminent domain; the Commission has therefore chosen to require an exemption applicant to own all the necessary lands for the project. Where a project would occupy U.S. lands or reservations, an exemption applicant must obtain a use permit from the appropriate federal agency. Additionally, in issuing regulations to implement the exemption from licensing

program, the Commission has decided that the municipal preference provision of Part I of the FPA shall not apply with respect to exemption applications.

Mr. Chairman, I think it would be useful at this time to quickly summarize relevant provisions of the FPA with regard to state water rights and how they have been interpreted by the courts. I believe this will help clarify both the Commission's approach to the water rights issue and the principles underlying that approach.

As I noted previously, Mr. Chairman, the Commission is required by Section 10(a) of the FPA to explore all issues relevant to the public interest in determining if a project will be best adapted to a comprehensive plan for improving or developing a waterway. Review of the legislative history of the Federal Water Power Act of 1920, the predecessor to the FPA, reveals that the framers, in order to avoid the previous fragmented and piecemeal control over hydroelectric projects, intended to vest in one agency -- the Commission -- the exclusive authority to carry out these public interest responsibilities. However, they also included in the FPA Section 27, 16 U.S.C. § 821, which provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

They also provided in Section 9(b) of the FPA, 16 U.S.C. § 802(a), that the Commission could require license applicants to submit:

> Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes.

The interrelationship of these two provisions with the Commission's exclusive licensing authority was addressed in the landmark United States Supreme Court decision in First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152 (1946). The predecessor commission, the FPC, in that case had dismissed a license application for a project to be located on a navigable river in the State of Iowa, because the applicant had not submitted evidence under Section 9(b) of the FPA that it had obtained a permit required under state law to construct the project. The court of appeals affirmed the Commission. However, the Supreme Court, after reviewing the relevant legislative history, reversed, holding that the FPA did not contemplate a dual system of duplicate state and federal permits and that the Commission's interpretation of the FPA would vest in the state a veto power over the project and could subordinate to the control of the state the comprehensive planning responsibilities Congress intended to have reside with the Commission. The Court interpreted Section 9(b) as only requiring that an applicant present such evidence of compliance with state laws as, in the Commission's judgment, would be appropriate to effect the purposes of the federal

license. With regard to Section 27, the Court interpreted that section as only protecting "proprietary" rights; in other words, only establishing a right of compensation for vested water rights taken by a Commission licensee.

First Iowa's holdings regarding the scope of Section 9(b) and compliance with state law were followed by the United States Court of Appeals for the Ninth Circuit in State of Washington, Department of Game v. FPC, 207 F.2d 391 (9th Cir. 1953), cert. denied, 347 U.S. 936 (1954). The court held that the licensee did not have to show compliance with the laws of the State of Washington, including a statute requiring it to obtain a permit for the diversion of water, prior to obtaining a Commission license, and that state laws cannot prevent the Commission from issuing a license or bar a licensee from acting under its license to build a dam on a navigable stream.

In 1954, the Supreme Court in FPC v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954), clarified its First Iowa "proprietary" rights statement by clearly holding that water rights, like other property rights taken by licensees, are compensable under the Federal Power Act.

The following year, the Supreme Court issued its Pelton Dam decision. (FPC v. Oregon, 349 U.S. 435 (1955).) The State of Oregon contended in that case that entities proposing to construct hydroelectric projects on lands constituting reservations of the United States had to obtain the permission of the states. The Court

rejected the state's contention that federal public lands legislation had transferred to the states control over projects to be located on reservations, and held that to allow the state to veto a project to be located on reserved lands by requiring the state's additional permission would result in the very duplication of regulatory control precluded by the First Iowa decision. Thus, the Court extended its First Iowa holding and rationale to projects to be located on reserved lands.

Two final decisions of relevance are the Ninth Circuit's decisions in Portland General Electric Co. v. FPC, 328 F.2d 165 (9th Cir. 1964), and State of California v. FPC, 345 F.2d 917 (9th Cir. 1965). In the first case, the court stated that the only purpose of Section 27 is to preserve to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise by another of a license granted by the Commission, and held that that section did not stand in the way of the Commission imposing navigation conditions in a license that could interfere with the licensee's retention and exercise of its state-granted water rights. In the second case, the court applied the same rationale to conclude that the Commission had authority to impose conditions which could impair a licensee's full use of irrigation water rights in future years, stating that, if an applicant wants a license, it must accept the reasonable restrictions and obligations attached thereto by the Commission.

The First Iowa and Pelton Dam decisions caused considerable apprehension and concern, particularly in the western states, because of the perceived effect of those decisions on western water rights and relationships between the federal government and the states. The concerns were by no means limited to those respecting hydroelectric licensing actions under the FPA, but rather focused on the broad and complex area of the respective interests of the United States and of the states in the use of the waters of certain streams, and involved various other statutes, including the Reclamation Act and the Flood Control Act of 1944. Examples of Congressional hearings on federal-state water rights questions, arising largely as a result of the First Iowa and Pelton Dam decisions, are those held on June 15 and 16, 1961, before the Committee on Interior and Insular Affairs, United States Senate, and on March 10-13, 1964, before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, United States Senate.

By the time of these hearings, it appeared quite clear that if a water power development, authorized indirectly by the Congress through a license under the FPA, would interfere with or take over or use a vested water right, the licensee must pay compensation. The second major issue, as indicated by the FPC at the hearing, concerned the question of who should control the comprehensive development of the national resources referred to in the First Iowa and Pelton Dam cases. The representatives of the FPC pointed out that if the policy of the FPA is to be continued in effect, then

the federal government through its commission should have the ultimate control as to what constitutes comprehensive development, and the individual states should not have an effective veto authority. Although various legislative proposals had been made during that period, no amendments to the FPA were made concerning the First Iowa and Pelton Dam cases.

Along with the tremendous increase in applications for non-federal hydroelectric projects that occurred in the late 1970's and continued into the 1980's, there appeared increased concern as to the respective interests of the United States and the individual states in the use of waters of various streams. Some of the more general concerns apparently reflect a perception by the states of a lack of cooperation and communication and a lack of acknowledgement or understanding, on the part of the Commission, of the concerns of the states.

These general concerns or issues appear to fall into three groups. First, there is the situation where the grant or expected grant of the water right for a hydroelectric project, to someone other than an applicant seeking Commission authorization for the project, is urged as sufficient grounds for denial of the applicant's proposal. This argument may be advanced by a competing applicant or someone else opposed to the applicant's proposal.

A second group would consist of situations where the Commission is urged to include, as a condition of its authorization, a requirement that the holder of the authorization agree to subordinate its

water rights for the project and its operation of the project to such things as a possible future increase in upstream depletions of flow or to some state or regional plan.

A third group would consist of situations where the assertion is made that the Commission cannot or should not condition an authorization so as to require, for example, a minimum flow for protection of the fishery resources, when such a condition would be inconsistent with or detract from the water rights granted for the project.

With respect to the first group, the Commission has held that a license applicant's lack of water rights for a project, at the time of Commission action, is not a sufficient basis for denial of the application, because the property rights that cannot be acquired by the licensee by purchase or agreement can be acquired by eminent domain pursuant to Section 21 of the FPA, 16 U.S.C. § 814, with compensation for the property rights so acquired. Although such eminent domain proceedings can be brought in either federal district court or state court, state law will be used for determining the amount of compensation. Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980), cert. denied, 450 U.S. 936 (1981). With regard to exemptions, the Commission has not required that exemption applicants must have water rights to be granted an exemption. This policy stems in part from the fact that some states will not grant a water rights permit until an exemption is obtained. Since an exemption-holder does not have the right of eminent domain by

reason of the exemption, if the exemption-holder did not have the property rights needed for the project, he would need to acquire the needed water rights without resort to eminent domain for the project to proceed.

Regarding the second group, the Commission can require the subordination of a licensee's water rights to possible future increases in upstream depletions if it determines that the subordination would be in the public interest. The Commission has cases pending before it that involve issues as to subordination of water rights. Because the cases are pending, it would be inappropriate to discuss the merits of those cases.

With respect to the third group, the situation can be, at least in some respects, quite similar to that involved in the California v. FPC case discussed briefly earlier. In that case the FPC had imposed a condition in the license that could operate to require future releases of water for the protection of fishery resources; the authority to so condition was upheld, even though the condition

could impair the licensee's full use of irrigation water rights in future years. In another case now pending before the Commission, involving an application for a new license for Brazos River Authority's Possum Kingdom Project No. 1490, the applicant has apparently challenged requests by federal and state agencies for minimum flow requirements, claiming impairment of its water rights and asserting distinguishing differences from the California v. FPC case.

The Commission procedures for processing the various hydroelectric applications appear to provide an adequate mechanism for those wishing to be heard to be able to bring their concerns before the Commission and provide whatever factual support and argument they wish to make. Because the Commission must make its decisions on the basis of the record before it, and because its decisions must be supported by substantial evidence, it is important that those who wish to be heard provide substantial support for any relief they seek.

With respect to applications for license and amendment of license, the Commission's regulations require that the applications address the "statutory or regulatory requirements of the state or states in which the project would be located that affect the project as proposed with respect to bed and banks and the appropriation, diversion, and use of water for power purposes." (18 CFR §§ 4.41, 4.51, 4.61, 4.201 (1986).)

When an application is filed with the Commission, it is examined to determine if it has complied with the requirements of the Commission's regulations. If found deficient, the applicant is given additional time to correct the deficiencies. If found patently deficient, the application is rejected.

When the application is found to conform to the regulations, public notice is issued. That notice is published in a newspaper circulated in the vicinity of the project and published in the Federal Register. Copies of the notice are mailed directly to federal, state, and local agencies that may be interested in the proposed project. A copy of the application itself is sent to each agency by the applicant at the same time it is initially filed with the Commission. The public notice solicits the comments of all interested agencies, organizations, and members of the public on the proposal submitted to the Commission. Comments, protests and motions to intervene form part of the record considered by the Commission before acting on the pending application.

I recognize that the Commission's jurisdiction is bound by the statutory authority delegated to it by Congress, and that Congress always retains the discretion to modify that legislative grant of authority consistent with the United States Constitution. To the extent Congress chooses to modify the Commission's jurisdiction under the Federal Power Act, for example, the Commission is obligated to exercise that jurisdiction consistent with the new boundaries drawn by Congress.

Mr. Chairman, the issues raised in this hearing are more broad than the Federal Power Act and the Commission's jurisdiction as delegated by Congress. Water rights involve competing state and federal interests under our system of federalism. For this reason, my comments are technical in nature, but I recognize the importance and sensitivity of water rights questions as they may arise in any and all proceedings before the Commission, the need for a balanced approach which seeks, to the extent practicable and consistent with the Commission's jurisdiction, to defer to the states on these important questions.

I would be pleased to respond to any questions you might have.

Senator MELCHER. Mr. Warner, how many applications do you have, or have you received, which involve the State of Montana?

Mr. WARNER. I do not have that number specifically, Senator, but I would be happy to provide that for the record.

[The information referred to follows:]

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

SEP 19 1986

MEMORANDUM TO: Christopher J. Warner, Acting General Counsel
Office of the General Counsel

FROM : Richard T. Hunt, Director
Office of Hydropower Licensing

SUBJECT : Hydropower Workload for Montana From Fiscal Year 1980 to 1986

For the record, as requested by Senator Melcher of Montana in the recent hearing before the Committee on Energy and Natural Resources, I am providing the hydropower workload statistics for the State of Montana from fiscal years 1980 through 1986. These data represent the number of applications for license, exemption, and preliminary permit, broken down into four status categories -- pending at the beginning of the year, total receipts (filings) for the year, completions (all terminations including issuances and other actions), and pending at the end of each fiscal year.

For the period in question, the following summary shows the total number of receipts, completions, and current pending cases for each category.

TOTAL	LICENSES	EXEMPTIONS	PERMITS
Receipts	27	40	204
Completions	25	38	196
Pending	9*	2	8

* There were 7 applications for license pending at the start of FY 1980.

As these figures demonstrate, OHL has managed to reduce backlog to a small number of cases pending in each category.

Attachment

Attachment

Office of Hydropower Licensing
Information and Systems Management
HYDROPOWER WORKLOAD FY1980 TO FY1986
STATE OF MONTANA

FISCAL YEAR	STATUS	LICENSES A01-A08	EXEMPTIONS \1 A17 & A22	PERMITS A13
1980	PEND START	7	0	0
	RECEIPTS	0	0	4
	COMPLETIONS	3	0	2
	PEND END	4	0	2
1981	PEND START	4	0	2
	RECEIPTS	1	0	56
	COMPLETIONS	0	0	15
	PEND END	5	0	43
1982	PEND START	5	0	43
	RECEIPTS	3	6	82
	COMPLETIONS	2	2	108
	PEND END	6	4	17
1983	PEND START	6	4	17
	RECEIPTS	3	8	19
	COMPLETIONS	0	10	19
	PEND END	9	2	17
1984	PEND START	9	2	17
	RECEIPTS	10	12	21
	COMPLETIONS	2	13	25
	PEND END	17	1	13
1985	PEND START	17	1	13
	RECEIPTS	8	10	8
	COMPLETIONS	6	10	12
	PEND END	19	1	9
1986	PEND START	19	1	9
	RECEIPTS	2	4	14
	COMPLETIONS	12	3	15
	PEND NOW	9	2	8

DATA ARE FROM READI II AS OF SEPT. 15,1986
\1 NO WORKLOAD ADJUSTMENTS WERE MADE FOR EXEMPTIONS VOIDED AS A RESULT OF THE TULALIP DECISION

Senator MELCHER. Are not the great majority of those falling under that category of exemption?

Mr. WARNER. I cannot give you the exact number as between exemptions and licenses, but I think in response to an earlier discussion a lot of the applications in Montana would most likely be preliminary permit applications. Of those, in terms of an historic track record, about 80 percent of them fall out before going to the licensing stage.

In addition, the Commission generally in this calendar year 1986 has seen a fairly significant dropoff nationwide in preliminary permit applications. Now there is some speculation that this may be due to the expiration of some of the Federal tax incentives, but the so-called hydro rush that we saw in terms of preliminary permit applications appears to have peaked in the early 1980s and now we may be seeing a declining set of preliminary permit applications coming to the Commission.

Senator MELCHER. Is there anything that says if you applied in 1980-81 your application is no longer viable?

Mr. WARNER. In terms of the preliminary permits granted, they do have a deadline.

Senator MELCHER. What is the deadline?

Mr. WARNER. Three years.

Senator MELCHER. Three years?

Mr. WARNER. In terms of the work.

Senator MELCHER. So anything filed before August of 1983, would make it dead right now, this month?

Mr. WARNER. Yes, if they have not completed their feasibility studies under that permit.

Senator MELCHER. How much staff do you have down there to figure out whether they have completed their feasibility studies?

Mr. WARNER. I can supply that for the record. We have an Office of Hydropower Licensing that does process it, and Mr. Springer may be able to address generally the personnel we have that reviews those preliminary permit applications.

Mr. SPRINGER. Essentially the preliminary permits that are issued, it is not normally a matter of our review when they become so-to-speak dead. There is a three-year period of time for the permittees to do all their necessary studies in order to decide whether to file a license.

We are generally not involved, other than in an overseeing role, in whether or not they are actually doing studies. Most of the ones that actually are not filed are because, in working with the agencies that we require them to consult with, the applicants have determined the projects are no longer feasible, either for economic, environmental, or an assortment of reasons, and they just do not file license applications.

As Mr. Warner says, I think our historical number is about 20 percent of issued preliminary permits actually turning into license or exemption applications.

Senator MELCHER. An exemption application is, generally speaking, for anything less than 15 megawatts?

Mr. SPRINGER. Generally less than 5 megawatts.

Senator MELCHER. Generally less than 5?

Mr. SPRINGER. Yes, sir.

Senator MELCHER. Do some go up as high as 10 or 15 megawatts?

Mr. SPRINGER. For very specialized cases they may go up to 15 megawatts. These are actually projects that are constructed within a man-made canal or conduit, but there are very few of those as compared to the others.

Senator MELCHER. Is it fair to say the applications made in Montana since 1980, or 1979, or in any benchmark year you want in that era, number several hundred?

Mr. SPRINGER. I would imagine if you consider all the applications we have received, yes.

Senator MELCHER. And that as of now you do not know how many of them are viable?

Mr. SPRINGER. In terms of actually pending license applications, meaning they are still viable as far as our process is concerned, I imagine the number is 30 or 40 or maybe even less.

Senator MELCHER. It would be reassuring if you could submit that list.

Mr. SPRINGER. Yes, sir, I would be happy to.

Senator MELCHER. I would be happy to see the garden weeded of the hundreds of applications that were made.

[The information referred to follows:]

RUN DATE: 12/15/86
REPORT NO: R47SY004-01

FEDERAL ENERGY REGULATORY COMMISSION
READI II SYSTEM
FOR USER AREA: HYDROPOWER
PENDING TECHNICAL WORKLOAD
LISTED BY STATE, DOCKET, SUB DOCKET
DATA AS OF 12/12/86

DOCKET NUMBER		APPLICANT NAME	FILING DATE	PROD CAT	PROJECT MANAGER	ST	DOCKET DESCRIPTION
EL86-39	000	PHILLIPS LAKE AT OKAGA	04/25/86	A16	PASKOWSKI	MT	DECLARATION OF INTENTION
P-1869	003	MONTANA POWER COMPANY	08/27/82	A10	FRAZIER	MT	THOMPSON FALLS
P-2543	004	THE MONTANA POWER COMPANY	09/26/85	A10	FRAZIER	MT	MILLTOWN
P-2752	000	NORTHERN LIGHTS, INC.	11/30/78	A02	HUNTER	MT	KOOTENAI RIVER
P-3725	002	MITEX, INC.	09/26/83	A03	GOEL	MT	SWIFT DAM
P-4703	000	CITY OF KALISPELL, MONTANA	05/20/81	A13	ROY-HARRISON	MT	LOWER CROW DAM
P-5208	001	FLATHEAD JOINT BOARD OF THE FLATHEA	11/04/81	A13	ROY-HARRISON	MT	LOWER CROW CREEK
P-5653	000	FLATHEAD JOINT BOARD OF THE FLATHEA	11/16/81	A13	ROY-HARRISON	MT	MISSION DAM POWER PROJECT
P-5655	000	FLATHEAD JOINT BOARD OF THE FLATHEA	11/16/81	A13	ROY-HARRISON	MT	POST CREEK POWER PROJECT
P-5656	000	FLATHEAD JOINT BOARD OF THE FLATHEA	11/16/81	A13	ROY-HARRISON	MT	DRY CREEK POWER PROJECT
P-6432	001	LIBERTY COUNTY, TOWN OF CHEST & MRR	07/13/82	A03	HUNTER	MT	TIBER DAM/ LAKE ELWELL
P-6863	001	GRISDALE HILL COMPANY	05/04/84	A03	HUNTER	MT	GIBSON DAM
P-7022	000	MALTA IRRIGATION DISTRICT ET AL.	01/25/83	A03	HUNTER	MT	TIBER DAM/ LAKE ELWELL
P-7099	000	CITY OF GILLETTE, WYOMING	02/23/83	A03	HUNTER	MT	TIBER DAM/ LAKE ELWELL
P-7664	002	EAST BENCH IRRIGATION DISTRICT	09/02/86	A03	ROY-HARRISON	MT	LIC-CLARK CANYON DAM PROJECT
P-7804	003	GERALD & GLENDA OHS	06/16/86	A09	FRAZIER	MT	NORTH WILLOW CREEK
P-7804	004	GLENDA AND GERALD OHS	06/16/86	A09	FRAZIER	MT	NORTH WILLOW CREEK
P-7978	000	BOULDER HYDRO	01/12/84	A06	GOEL	MT	BOULDER CREEK
P-9319	000	KEITH AND MARILYN PETERSON	07/02/85	A06	FRAZIER	MT	CIRCLE ARROW
P-9364	000	WESTERN MONTANA ELEC. GENERATING &	07/29/85	A13	DEAN	MT	PERMIT/PAINTED ROCKS DAM
P-9535	000	PAINTED ROCKS HYDRO ASSOCIATES	10/09/85	A13	DEAN	MT	PERMIT - PAINTED ROCKS PROJ
P-9717	000	HYDRODYNAMICS, INC	12/24/85	A17	BERNT	MT	EX - EAST FORK MILL CREEK
P-9937	000	BITTERROOT CONSERVATION DISTRICT	03/04/86	A13	DEAN	MT	PERMIT - ROCKS WATER PWR PROJ
P-10014	000	FREDERICK BURNELL, ET AL	06/09/86	A17	ROY-HARRISON	MT	EXEMPTION - SHARROTT CR PLANT
P-10122	000	CARL LIEBIG	10/20/86	A17	BERNT	MT	EXEMPTION - BOULDER CREEK PROJ
P-10173	000	CITY OF LIBBY	11/19/86	A13	BERNT	MT	PERMIT - JENNINGS RAPIDS PROJ

NO. CASES 26

A01 MAJOR HYDRO - CONSTRUCTED
A02 MAJOR HYDRO - NEW CAP.(FORMAL)
A03 MAJOR HYDRO - NEW (NON-FORMAL)
A04 MAJOR HYDRO RELICENSE (FORMAL)
A05 MAJOR HYDRO RELIC.(NON-FORMAL)
A06 MINOR HYDRO - NEW CAPACITY
A07 MINOR HYDRO - RELICENSE
A08 MINOR HYDRO - CONSTRUCTED
A09 AMENDMENTS TO LICENSES
A10 AMENDMENTS (NEW CAPACITY)
A11 SURRENDER OF HYDRO LICENSE
A12 TRANSFER OF HYDRO LICENSE
A13 PRELIMINARY PERMIT
A14 HYDRO LIC - TRANS LINE APPLIC
A15 HYDRO LIC - NON PROJ LANDS USE
A16 DECLARATION OF INTENTION
A17 EXEMPTIONS - FIVE MW OR LESS

Senator MELCHER. Mr. Warner, granted FERC is comfortable with whatever Congress does, but I am a little bit amazed at your expression of comfort with the cases that followed the *First Iowa* decision. Does that not create a terrible burden on you to determine where the water is, whether there is any water, what effect it has on everybody, including other agencies of the Federal Government?

I am a little bit amazed at your statement.

Mr. WARNER. Senator, it is an obligation of the Commission under 10(a) of the Federal Power Act, and as interpreted by the courts that is a broad public interest standard. At the same time, the Commission sits as an adjudicator of the record evidence that is brought to bear in a specific case. So the applicant bears quite a bit of burden in terms of making a showing of substantial evidence that it has met the 10(a) standard.

In addition, to the extent other agencies come in and do intervene in these specific proceedings, for example, the State of Maine with their comprehensive plan, when a comprehensive plan is submitted and is offered in a specific proceeding and it includes very specific technical data and it provides good, hard evidence as to the resource impacts, then that is a very substantial aid to the Commission.

I think the State agencies should be complimented in their efforts to provide that type of data. In the required consultation process, the applicants in consulting with the State resource agencies must provide evidence as to whether their applications comport with resource plans of those agencies. Then the Commission will have that in the record before it.

But you are absolutely correct that as an adjudicator the Commission must take the evidence in the record before it. That evidence must be judged on a substantial evidence standard. So that, for example, if a State agency has a concern over a particular application that may not comport with its comprehensive plan, that State agency does itself bear the burden to come in, to intervene before the Commission, and to provide evidence to the Commission on the record as to the inconsistency or consistency of the application with that comprehensive plan.

But overall, the Commission is the ultimate decisionmaker, and that does obligate it to look at the substantial evidence in the record and make a decision.

Senator MELCHER. There are two parts to my question. Let us take you out West. We have an application in Montana on one of the streams, and the first part of my question was how well equipped are you and all of FERC to determine what the impact would be on water rights. For instance on an irrigation project involving the Bureau of Reclamation?

Mr. WARNER. Well, again we must take the evidence in the record. To a great extent, the applicant——

Senator MELCHER. How do you get that evidence from the Bureau of Reclamation?

Mr. SPRINGER. The Bureau of Reclamation, along with other Federal, State, and local agencies, is formally requested by the Commission to comment on any license application once we have found it be to acceptable. For example, with Reclamation——

Senator MELCHER. Once it is found to be acceptable.

Mr. SPRINGER. Yes, sir. But that also——

Senator MELCHER. When you have already done the adjudication, you are going to ask the Bureau for an okay?

Mr. SPRINGER. No, no. This is merely letting them in the door, so to speak. This is followed, this consultation process——

Senator MELCHER. When you say "once a license is acceptable, 'do you mean once the application is being reviewed? Or once you have decided that it is a good license?

Mr. SPRINGER. The license application has merely passed the threshold of complying with our regulations as to content.

Mr. WARNER. Just the filing of the application.

Mr. SPRINGER. It has nothing to do with the final result the Commission might issue.

At that early stage, we would solicit comments from all of the interested agencies and, for example, Reclamation has never hesitated to give us a complete discussion when one of their projects is affected as to the things you are exactly talking about, the irrigation needs, the people they are trying to protect, the times the project could or could not operate, and essentially all of these things which we definitely take into consideration.

Any agency, as Mr. Warner said, who has a vested interest and chooses to provide us with this type of evidence with a certain amount of documentation so we can understand why they have made their statements would have its comments very carefully considered by the staff of the Commission and the Commission in reaching any judgment.

Senator MELCHER. Where do you think the Bureau of Reclamation is going to get its information in a State like Montana?

Mr. SPRINGER. Well, considering there are many local employees and their history at a particular site, I assume they would get it from their own forces. We do not know whether they go to the States themselves, but, as Mr. Warner indicated before, one of the reasons we instituted as a requirement a preconsultation procedure was to try to force some of this information to be available on the record.

Senator MELCHER. We have heard testimony from the State of Maine and you can hear it from the eastern States where they have a different set of concerns which we might share in the West. I do not think they are going to share western water law doctrine because it does not hold in the East.

What do you have to show that you have worked with western water law doctrine?

Mr. WARNER. Senator, I think one of the key questions here is the subordination issue, too. I think we can talk about procedures, we can talk about consultation and all that, but one of the key questions that I think we face is subordination to some future diversion of water in the West and the question of what the Commission's policy should be when a State water agency presents it with a request that the license be subordinate to some future contingency or action or future diversion of water.

On that, I think you are absolutely correct. That is a very tough question for an agency sitting in Washington to call. We must rely to the extent practicable on data provided by the State agencies.

Senator MELCHER. I think you have to begin with what effect the licensee, if he does complete whatever he is proposing, has on an existing water right. What surprises me is that you feel comfortable with the line of *Iowa* cases, because it puts you right in that position of determining whether if there is any licensee, what he is going to do about existing water rights already in existence.

Unless there is some way of guiding you, I do not know how you can get across this hurdle. I would think that FERC would be the first to say, well, we want assistance out of the States in the West on what water is available, who is using it, and who has got a right to it. I do not know why you would want to give a license to somebody who is not going to have the water to generate power with, anyway, when a water right does not exist for him to absorb.

Mr. WARNER. Senator, first of all, my comfort with *First Iowa* and that line of cases does not have to do with a policy. I do not have an opinion as to whether that is necessarily a correct policy.

My point is that we believe it still is the law that we must apply, as interpreted. But secondly——

Senator MELCHER. Well, the bottom line of the law you are thinking about is condemnation to get a water right. When did FERC ever file a condemnation suit in the West for getting a water right?

Mr. SPRINGER. FERC does not of itself file those in the first place.

Senator MELCHER. Pardon me?

Mr. SPRINGER. The Commission does not take that sort of action itself. The licensees, if they have not been able to obtain through negotiation rights, including water rights, would then take that license into court and try through eminent domain to obtain whatever rights they need. The Commission itself does not pursue that.

Senator MELCHER. When did it ever occur?

Mr. WARNER. As far as the individual licensees exercising eminent domain authority to acquire?

Senator MELCHER. On any license that FERC ever issued.

Mr. WARNER. To acquire water rights?

Senator MELCHER. Yes.

Mr. WARNER. I could supply a number of the cases for the record.

Senator MELCHER. Does that not concern you, if you are granting licenses and you do not know where the water is going to come from?

Mr. WARNER. Well, after the license is issued, I should clarify, we do not know what the licensee is going to do to acquire the water rights. They are the ones that exercise the eminent domain authority, not the Commission.

Senator MELCHER. I am again amazed that you are comfortable with the line of suits following *Iowa*. I suspect if you want to research it you can find where some municipality or somebody tried and maybe were successful in condemning somebody's water rights, obtaining water on the basis if condemnation, but I do not know why FERC would be very comfortable in dealing with licenses not knowing where the water is going to come from, and not knowing whether there is going to be a condemnation suit to follow that, et cetera.

Mr. WARNER. Senator, I think——

Senator MELCHER. One of the best ways of getting FERC out of business in a hurry would be a whole line of condemnation suits

filed after FERC had issued a license to somebody. I can tell you that there would be a great effort here in Congress to end FERC.

Mr. WARNER. Senator, I cannot agree more. That is precisely, I think, the purpose behind the consultation requirements in our regulations.

Senator MELCHER. The consultation requirements, as you just heard from the testimony, in one instance cost almost $1 million for a State that has 835,000 people, but happens to have an awful lot of water, and which has attracted several hundred applications, now pending before FERC, to develop something in regard to that water.

I am saying to you, Mr. Warner, and your whole group down there, that if you are comfortable with the way it exists now, you are comfortable with chaos. There is no way of determining whether a license application is going to get any water without consulting somebody in the State. You not only have the Federal agencies involved, but you have some responsibility for State projects. You will have Indians involved for whom the Federal Government has a trust responsibility to protect their water rights. Then you have got everybody that lives in the State and the State itself trying to protect in-stream flow to protect the fish habitat and other things.

Now all of these are pretty heavy things, and they are not going to be resolved very easily by just saying to the applicant, "Well, you look all right. You have consulted everybody, and as far as we can tell from your consultations you are all right". There must be some procedure to know whether they have settled the rights to the water they might be using.

We do not want chaos for FERC. I think you will be out of business very quickly if there is not some basis for resolving these issues easily, and I think you want the States to do it. If you find favor with the line of *Iowa* cases, maybe you ought to review why you find favor with them, because I think you need help.

I think you need it just as bad as the States do. If these line of cases place in doubt who is going to be saying who has got a water right, which in my understanding of the western water law doctrine, you had better go to the States because they are the only ones who are in a position to do it.

Mr. WARNER. Again, Senator, the comfort is not as to the policy behind those cases; it is only as to the interpretation as to whether we are obligated under those cases to apply the law.

Senator MELCHER. The policy leads you into chaos. That is what I am saying. You may be blessed with not having any applicants in the West pursue their application for a license, but I can guarantee you that if very many of them did, whether it is in Montana, or Wyoming, or Idaho, or Colorado, or New Mexico, or California, you are going to have an awful lot of problems unless somebody is the arbiter over who has got a water right, right now.

These are not something off in the future, you are part of the Federal Government. That trust responsibility for Indian water rights for example, comes from Congress to all of the agencies, including FERC.

Mr. WARNER. Yes, sir.

Senator MELCHER. We understand out in Montana how serious that is, and the only way we can handle it is by getting some agree-

ment with the Tribes. You are not going to get that agreement sitting down there with your 30, or 40, or 120 staff. That takes countless hours of arrangements, meetings, and final agreement. There are one or two Tribes we might be somewhere close in Montana to having final agreement on how we handle their water rights, but you cannot get anywhere in the West, unless you have got States being the arbiter of who has the water right and assisting you in your procedures.

I hope you will review this all. Perhaps there can be something constructive done by this Administration in regard to the Western States by coming up with the idea that they want a clarification of the Federal Power Act in regard to this. We sit around here just talking about problems and we never seem to solve them. You are getting in the middle of this now. You are "acting" solicitor, or——

Mr. WARNER. I am Acting General Counsel, yes, sir.

Senator MELCHER. Do we have your nomination before us?

Mr. WARNER. I do not believe it is to be confirmed.

Senator MELCHER. It is not subject?

Mr. WARNER. No, sir.

Senator MELCHER. When are they going to make you permanent?

Mr. WARNER. That is not my choice to make, Senator.

Senator MELCHER. What is the status of the *Swan Falls* case?

Mr. WARNER. Mr. Chairman, I can provide more detail on that for the record. The Idaho Power Company has filed a petition for declaratory order regarding the subordination of water rights issue, and there have been extensive settlement discussions among the State of Idaho, Idaho Power Company, the Fish and Wildlife Service, the National Marine Fisheries Service, and other relevant parties.

The last event of note I believe was in March of this year. The Fish and Wildlife Service filed an offer of settlement with the State of Idaho and the Idaho Power Company which would have resolved the issues regarding subordination of water rights. The Commission at this time still has that petition before it and has not yet taken any final action on it.

Senator MELCHER. When do you think you will reach a decision? When will the Commission reach a decision?

Mr. WARNER. I cannot predict at this time, but I would be happy to go back and check and supply an answer for the record.

[The information referred to follows:]

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D C 20426

OFFICE OF THE CHAIRMAN

October 30, 1986

Honorable James A. McClure
Chairman, Committee on
Energy and Natural Resources
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I have reviewed sections 12 and 13 of H.R. 5465, legislation passed by both the Senate and House during the last Congress. To the extent these sections relate to the scheduling of Commission action on cases pending before the Commission, I want to assure you that I intend to request that the Commission act on these cases no later (and hopefully earlier) than the deadlines set by the Congress in these two sections.

Specifically, I will request that the Commission, within ninety days of passage of H.R. 5465 by the Congress, issue an order in Docket No. EL85-38-000 relating to the petition for declaratory order filed by the Idaho Power Company.

I will also request that the Commission, no later than November 17, 1986, publish a schedule for issuing a final order in the ANR Pipeline Company case, Docket No. RP82-80-000, no later than February 28, 1987, and that such schedule should include an opportunity for oral argument prior to issuance of the final order, unless the Commission determines that such argument would not assist the Commission in deciding the case.

If I can be of assistance to you on this or any other matter, please do not hesitate to ask.

Sincerely,

Martha

Martha O. Hesse
Chairman

Senator MELCHER. I asked those questions on behalf of Chairman McClure. I think he would be very interested in some sort of an estimate on when a decision could be made.

Mr. WARNER. We will be happy to supply that for the record.

Senator MELCHER. Thank you both, very much. That is all we have.

Mr. WARNER. Thank you, Mr. Chairman.

Senator MELCHER. The committee will be adjourned.

[Whereupon, at 11:41 a.m., the hearing was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LAND AND WATER MANAGEMENT

3601 C STREET
P.O. BOX 7005
ANCHORAGE, ALASKA 99510-7005
PHONE: (907) 561-2020

September 4, 1986

Mr. Larry Fasbender, Director
Montana Department of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena, Montana 59620

Dear Mr. Fasbender:

Alaska shares the concerns raised in your August 19, 1986, letter regarding the impact of Federal Energy Regulatory Commission actions on state water law and resource planning. Due to the location of most of our hydro projects and the lack of development in the areas conflict with FERC projects have not as yet been a problem. However, the potential does exist for possible future conflicts.

We support amending the Federal Power Act to require FERC to be responsive to state water law and resource planning. Additionally, we feel hydropower projects of 100 kilowatts or smaller should be exempt from any FERC requirements and be regulated by the states. Alaska's Water Use Act currently has the necessary framework to allow us to assume our agency's required role quite effectively.

Our experience with FERC has been unacceptable in our dam safety program. There has been no cooperation from FERC. We would like to be involved enough in FERC dam safety activities to allow us to utilize their inspections and information to fulfil our responsibility to protect the state's interest. This would also not burden the owner with an additional regulatory agency to deal with in detail. We recommend amending the Federal Power Act to require FERC to cooperate with state dam safety programs.

We do not have the resources to allow us to attend the September 12 hearing, but we would appreciate your adding our concerns to the body of information you are collecting. Additionally we support generally the position of the Western States Water Council on this issue.

Sincerely,

Tom Hawkins

Tom Hawkins
Director

cc: Commissioner Wunnicke
Senator Stevens
Senator Murkowski
Representative Young

Arkansas
Soil and Water
Conservation Commission

J. Randy Young
Director

ONE CAPITOL MALL
SUITE 2D
LITTLE ROCK, ARKANSAS 72201

PHONE 501-371-1611

September 8, 1986

The Honorable Dale Bumpers
United States Senator
ATTN: Rebecca Lancaster
3229 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Bumpers:

RE: Written Testimony for Committee on Energy and Natural Resources Oversite Hearing on September 12, 1986

I wish to submit the enclosed written testimony for consideration by the Committee on Energy and Natural Resources in its review of the application of state water law in Federal Energy Regulatory Commission's hydroelectric licensing proceedings. I would appreciate you insuring that this testimony is placed in the record.

Sincerely,

Randy Young

J. Randy Young, P.E.
Director, ASWCC

JRY:ph

Enclosure

cc: ASWCC Commissioiners
Phil Price , Governor's Office
Jerrell Clark, Arkansas PSC
Larry Fasbender, Montana, DNR&C

An Equal Opportunity Employer

WRITTEN TESTIMONY OF THE ARKANSAS SOIL AND

WATER CONSERVATION COMMISSION

Before the

Committee on Energy and Natural Resources
Concerning
the Application of State
Water Law during the Federal Energy Regulatory
Commission's Hydroelectric Licensing Proceedings

12 September 1986

J. Randy Young, P.E., Executive Director of the Arkansas Soil and Water Conservation Commission (ASWCC), presents the following written testimony for and on behalf of the ASWCC concerning the Application of State Water Law during the Federal Energy Regulatory Commission's hydroelectric licensing proceedings.

The State of Arkansas has been blessed with an abundance of water, which its citizens value highly. The Arkansas General Assembly has given the ASWCC the responsibility for the planning and development of this valuable resource within the state.

This responsibility for state programs includes Soil and Water Conservation, State Water Planning, Water Resources Development and Financing, Water Rights, Flood Control, Floodplain Management and Dam Safety. Development of sound state level policy for the wise use and development of the state's soil and water resources is a primary objective.

In the past, states have been responsible for development of the water resources within their boundaries. The current Federal Power Act (FPA) , as interpreted by the federal courts, grants the Federal Energy Regulatory Commission (FERC) broad powers in regulating waters that might be used for hydroelectric generation. These powers included the pre-emption of state's ability to determine water use within its boundaries and delegates unbridled discretion to FERC in determining what policy is in the best interest of the public.

The State of Arkansas has not had the problems that the western states have had, but recent changes in Arkansas' water law and the increased cost of electricity make this confrontation very likely. I will cite one possible confrontation.

The Arkansas River runs diagonally from northwest to southeast through the state. The river has potential to provide much water for domestic, agricultural, and industrial uses. The McClellan-Kerr Navigation System has provided the State of Arkansas many transportation benefits by placing locks and dams in the river.

Advances in technology and the increased cost of electricity make low head hydroelectric generators economically feasible on many of these dams. Because these generators are on federal dams and use water from navigable streams in power generation, the FPA gives FERC power to regulate water use at these projects.

At same time, the Arkansas General Assembly has recognize that some areas of the State are deficient in water while others have an excess. In its last session, the General Assembly inacted legislation granting the ASWCC the power to allow the transport of excess water to deficit areas when the ASWCC determines such transport would be beneficial to the state. A major source of excess water is the Arkansas River. This excess water can be used to provide irrigation water in deficient areas and to supply needed water for the state's economic development. At the present time, there are feasibility studies being conducted to determine whether this water might be used as a water source for agricultural, public and industrial purposes. Even though uncertainty exists with respect to future potential uses of Arkansas River water, the ASWCC projects that this water may become a major water supply for the Arkansas River Valley area of the state.

Under the present FPA, FERC could set aside water in the river for power generation or even a proposed power generating facility. Power generation is certainly a highly valuable use of water, but other valuable uses should be considered in determining the best use for that water .

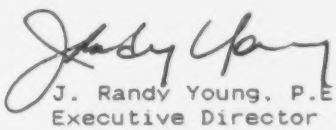
The question is whether water policy should be made on a state or national level. In the past, it was thought that such policy could be best made on the state level. In recent times, the balance seems to be moving toward the federal government making major water policy decisions. In licensing hydroelectric plants, FERC is interpreting its authority as broadly as possible. In some cases, state water policy decisions have been ignored and in others overruled by FERC.

While realizing that power generation has national impact, the ASWCC thinks that because the states are much more attuned to their individual resource development needs, the state's determination should be paramount.

In licensing plants, the ASWCC thinks that FERC should be directed in its actions by the decision of state water agency or agencies under applicable state laws regulating the appropriation and use of water.

The ASWCC is in strong support of legislation returning the water policy determinationn to the states.

Respectfully Submitted,



J. Randy Young, P.E.
Executive Director
Arkansas Soil and Water
Conservation Commission

STATE OF CALIFORNIA—THE RESOURCES AGENCY GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF WATER RESOURCES
1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 445-9248

September 10, 1986

Senator James A. McClure, Chairman
Committee on Energy and Natural
Resources
United States Senate
Senate Russell Office Building, Rm. 358
Washington, D.C. 20510-6150

Dear Senator McClure:

Director David N. Kennedy appreciates the opportunity to submit a statement for inclusion in the record of your committee's September 12, 1986, hearing on state water law and the Federal Energy Regulatory Commission's licensing of hydroelectric power projects. We share the concerns expressed by the other western states over federal interference in areas of traditional state water rights authority. I would be pleased to assist your committee in any way I can, in formulating amendments to the Federal Power Act to restore and assure ongoing federal deference to the substance and procedures of water rights law.

If you have any questions, please do not hesitate to contact Director Kennedy at (916) 445-6582, or have your staff call Robert Moore in California's Washington, D.C., office at (202) 347-6874, or John Kramer at (916) 445-9951.

Sincerely,

Robert W. James
Chief Counsel

cc: Larry Fasbender, Director
Montana Dept. of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena, Montana 59620

Craig Bell, Executive Director
Western States Water Council
220 South 2d East, Ste. 200
Salt Lake City, Utah 84111

STATEMENT OF
DAVID N. KENNEDY, DIRECTOR
CALIFORNIA DEPARTMENT OF WATER RESOURCES

BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES

UNITED STATES SENATE

REGARDING IMPACT OF FEDERAL ENERGY
REGULATORY COMMISSION HYDROPOWER
LICENSING DECISIONS ON CALIFORNIA
WATER RIGHTS ADMINISTRATION

WASHINGTON, D.C.
SEPTEMBER 12, 1986

Mr. Chairman. Members of the Committee:

I am the Director of the California Department of Water Resources (DWR).

Among its other responsibilities, the DWR is responsible for conducting investigations and planning for full development and use of water resources within the State of California. Many of these responsibilities are conducted in coordination with the California State Water Resources Control Board (SWRCB). The SWRCB administers California's water rights and water quality laws: among its other responsibilities, the SWRCB allocates and supervises exercise of appropriative water rights initiated after 1914. The DWR Resources and the SWRCB share the responsibility for taking all appropriate actions to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, which are prohibited by California's Constitution.

I share the concerns expressed by the Western States Water Council concerning preemption of State water rights law under current interpretations of the Federal Power Act, and administration of that law by the Federal Energy Regulatory Commission (FERC). I am sympathetic to the problems and concerns of the other Western states.

Although Section 9(b) and Section 27 of the Federal Power Act plainly require recognition of state law, current interpretations appear to sanction almost total preemption of state water rights allocation and water resources management. Section 9(b) requires an applicant for a license to submit to FERC satisfactory evidence

of compliance with state laws, including appropriation, diversion and use of water. Section 27 provides that nothing in the Federal Power Act shall be construed as affecting state laws regarding appropriation and use of water. However, under color of First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946) and subsequent Federal Court decisions, hydropower licensing has occurred with little, if any attention paid to the substance and procedure of state law.

The Federal Energy Regulatory Commission (FERC) has done little to conform its licensing requirements to accommodate state concerns. In addition, licensees have raised federal preemption as a bar to conformance with the most fundamental state requirements.

California has not experienced the direct collisions between its water rights administration and the Federal Energy Regulatory Commission (FERC), which I am sure other western states have brought to your attention. Nonetheless, we have had several instances in which FERC licensees have claimed federal preemption as an attempt to shield themselves from requirements of California's water rights, environmental and other laws. In one instance, which I will describe below, a California holder of a FERC license has argued that Federal Power Act preemption leaves the SWRCB with no authority other than determining whether water is available for appropriation.

In State of California v. United States, 438 U.S. 645 (1978), the United States Supreme Court held that Section 8 of the Reclamation Act of 1902 requires the Secretary of the Interior to comply with California water rights law when appropriating water for federal reclamation projects, including any conditions imposed by the SWRCB unless there are specific, inconsistent congressional directives. The Court made it clear that Section 8 of the Reclamation Act of 1902 was in furtherance of a long standing tradition of congressional deference to state water laws. The Supreme Court remanded the case to determine whether any of the conditions imposed by the SWRCB were inconsistent with congressional directives. In the final opinion in that case, the Ninth Circuit Court of Appeals upheld all of the conditions, United States v. California 695 F.2d 1171 (1982). The Court noted that:

> "The precepts of federalism, if followed, should produce mutual respect and accommodation for state interests. The congressional scheme and the Supreme Court's earlier decision in this case make it clear that such precepts are to be carefully observed here. The United States may not justify its demands simply as a raw exercise of superior authority." 694 F.2d at 1178.

Congress had Section 8 clearly in mind in enacting the Federal Power Act. It intended that the requirement of deference to state law in the 1902 reclamation law would be continued through the

comparable provisions of the Federal Power Act for licenses issued to exploit falling water on the public lands in the West.

Between 1914 and 1920, Congress considered at least five bills relating to hydroelectric power licensing before adopting the Federal Power Act in 1920. These bills included language taken from Section 8 of the Reclamation Act. For example, in a 1916 debate, Congressman Taylor stated:

> The gentleman from Wyoming is familiar, of course, with the fact that this is the language that was used in the original reclamation act of June 17, 1902, and we put it in the Hetch Hetchy California bill, and I think I may claim the authorship of it in that bill and in this and other bills, to prevent any question arising as to whether or not Congress intended to in any way interfere with our water rights or doctrine of priority: and I am confident the sentiment of the West is very much in favor of retaining this language. Whether or not it may be necessary, it will do no harm, and I must insist upon that provision remaining in the bill. (Remarks of Congressman Taylor, 53 Cong. Rec. 740 (1916).)

The language which Congressman Taylor referred to read in part: "...nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state, including Alaska, relating to the control, appropriation, use or distribution of water." (HR Rep. No. 16, 64th Cong. 1st Sess. p.4 (1916).) This language is similar to that appearing in

Section 27 of the Federal Power Act, and it makes it perfectly clear that Section 27 was virtually copied from Section 8 of the 1902 Reclamation Act. The record from 1914 to 1920 is replete with similar references, stressing that Congress intended that state law would apply. In several instances, efforts to amend the Act to immunize licensees against state requirements were defeated. I would be pleased to provide further citations to the legislative history of Sections 9(b) and 27 of the Federal Power Act, if your committee wishes them.

While Congress clearly intended deference to the substance and procedure of state law, our experiences with FERC and its licensees show instead indifference to state law. Several examples illustrate this.

The California Environmental Quality Act (CEQA)(California Pub. Resources Code §21000, et seq) is similar to the National Environmental Policy Act (NEPA). Both Acts encourage preparation of a single environmental impact analysis document through coordination of State and Federal requirements. Both Acts intend to minimize unnecessary duplication and overlap.

In many instances, California agencies have profited by these provisions by cooperating with federal agencies in the preparation of a single report which complies both with the requirements of CEQA and NEPA. Yet, the California regulations interpreting CEQA contain a provision entitled "Where a Federal Agency will not Cooperate" (Title 14 Cal.Adm. Code § 15228). This section contains

advice to California public agencies to proceed independently while persisting in efforts to coordinate the State and Federal requirements. The explanation accompanying this section when it was adopted states:

> "Despite inclusion of the section on joint activities in the federal NEPA regulations, there are occasional problems with federal agencies which will not cooperate with state or local agencies under environmental review statutes. This problem is most frequently encountered with the Federal Energy Regulatory Commission.... Because FERC refuses to cooperate with state and local agencies, many energy-related projects cannot benefit from the efficiencies provided by joint activities. This section provides essential guidance on how to handle that situation."

A case currently pending before the United States District Court, Eastern District of California, illustrates the problems that current interpretations of the Federal Power Act can cause. Sayles Hydro Associates v. United States (No. CIVS-86-0868LKK) involves a FERC decision to issue a license for a small hydroelectric power project on the South Fork American River. The proposed Sayles Flat Project is located next to U.S. Highway 50, which provides access from northern California to South Lake Tahoe. The project would interfere with use of land by Camp Sacramento, a recreational complex operated by the City of Sacramento. The California Department of Transportation has expressed concern over the potential impacts of this project on Highway 50 and the safety of the traveling public. Other California concerns include impact on Camp Sacramento, on recreational use of the river, and on fisheries.

Under California water rights law, the SWRCB must determine whether unappropriated water is available and whether the proposed project is consistent with the public interest, and with the public trust. In determining the public interest, and in implementing the public trust, the SWRCB must consider a broad range of environmental values. The SWRCB is also required under CEQA to determine whether the proposed diversion and use of water will have a significant effect on the environment; if so, it must prepare an Environmental Impact Report (EIR).

The developer has not provided the SWRCB with sufficient timely information to enable the SWRCB staff to complete an EIR, as required by regulations implementing CEQA. Instead, in July 1986, the developer brought suit against the SWRCB and several federal agencies. The developer contends that it is not obligated to comply with any permit terms and conditions because it has received a power license from FERC pursuant to the Federal Power Act. It contends that, as a result of the FERC license, the SWRCB's authority is limited to determining whether water is available for appropriation.

In issuing that license, FERC staff determined that no EIS was required under NEPA. This determination was based primarily on the developer's environmental assessment, even through final plans and specifications for the project were not prepared, and the full impact of the project could not be known.

The Sayles Flat Project illustrates the conflict that preemption of state law can cause. If deference to State water rights law were required and if the environmental review processes were coordinated (as they are with many other federal agencies), much costly litigation, including the Sayles Hydro case could be avoided.

In other instances, assertions of preemption by licensees have caused other problems. In one instance, FERC has issued a license for the Miners Tunnel Project on the South Fork of the Yuba River. The developer plans to construct the project on State Park land, despite the fact that the State has proposed that this park would be the first wheelchair accessable park in the State. The developer has claimed that the FERC approval gives it the authority to condemn State Park land, a claim which the State strenuously opposes.

In another instance, the FERC policy of not requiring the applicant to demonstrate that it has valid water rights for a project --despite the clear language of Section 9(b)--has forced the State to intervene. In this instance, the developer proposes a project where the SWRCB staff believes that there may not be any unappropriated water available.

These examples underscore the concerns expressed by the Western States Water Council and its member states. The Western States Water Council has proposed amendments to the Federal Power Act to address these concerns. These amendments would add language to

Section 6 to prohibit the issuance of a license or exemption from licensing unless the applicant proves compliance with state law governing acquisition of water rights. Section 21 would be amended to provide that eminent domain authorized under the Federal Power Act could not be used to acquire water rights. Section 27 would be amended to further clarify that the Federal Power Act does not authorize the United States or licensees rights to appropriate or use water, and that full compliance with the substance and procedures of state law is required.

I support these amendments, and I believe that this would cure many of the problems the western states have encountered. I hope that this Committee will address these concerns and propose amendments which will assure that the Federal Power Act cannot be interpreted as allowing licensees to subvert State law and policies governing appropriation and use of water.

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STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

September 11, 1986

Honorable James A. McClure, Chairman
Energy and Natural Resources Committee
United States Senate
Room SD 358
Dirksen Senate Office Bldg. on
Constitution Avenue between
1st and 2nd Streets, N.E.
Washington, D.C. 20510

Re: Submittal of Written Statement for Jim Jones

Dear Jim:

I attach a written statement for inclusion in the record of the oversight hearing regarding the Federal Energy Regulatory Commission on September 12, 1986.

With best wishes, I am,

Sincerely,

JIM JONES
ATTORNEY GENERAL

JTJ/tg

WRITTEN STATEMENT OF

JIM JONES

ATTORNEY GENERAL

STATE OF IDAHO

SUBMITTED TO THE

SENATE COMMITTEE

ON ENERGY AND

NATURAL RESOURCES

SEPTEMBER 12, 1986

The following comments of Idaho Attorney General Jim Jones represent the views of the State of Idaho on the relationship of the Federal Energy Regulatory Commission (FERC) with state government.

These comments will review the development of western water law, the history of the Federal Power Act, some of the major cases relevant thereto, and the problems created for an arid state such as the State of Idaho by the current status of the law and by the FERC's administration of the law.

At the outset the State of Idaho wants to emphasize that it recognizes that both the States and the Federal Government have important roles to play in regulating the use of our nation's water. These roles differ. The Federal Government early on asserted interests in use of the nation's waters as highways for transportation of goods in commerce and for the common defense. The States assumed primary control over the development of private rights in the use of water. These state property rights differed greatly among the states in response to geographical, climatic and economic differences. The Eastern States with their plentiful natural supply of water retained in some form, often modified, the English common law doctrine of riparian rights; the Western States with their arid character and with their natural resource based economies of mineral extraction and

of irrigated agriculture required a form of strict regulation of water use that became known as the prior appropriation doctrine.

This arid character of the Western States of necessity mandated that those states more carefully allocate their limited water resources. This more careful allocation began by redefining the phrase "beneficial use of water" first in the courts to require the use of water to be reasonable and later in the legislature to expand the scope of those uses. Today, that phrase in Idaho includes the maintenance of instream flows for protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality, in addition to the traditional meaning of that term for consumptive uses.

The need for more careful allocation of water resources also provided the impetus for the arid Western States to conduct comprehensive planning with respect to the use of those water resources. In the exercise of their sovereignty the people of the State of Idaho ratified in 1964 a proposed constitutional amendment that authorized the creation of a water resources agency with the power to formulate a state water plan for optimum development of water resources in the public interest. The State of Idaho has had in effect a State Water Plan since the mid 1970's.

These geographic, climatic, and economic differences between regions of the United States mandate different local solutions to water allocation questions. Congress has understood these differences and thus, has been very deferential to state control of water allocation. Beginning with the Mining Act of 1866 and continuing through the enactment of the FPA, the consistent thread of this history was a purposeful and continued deference to state water law by Congress. For example, Section 8 of the Reclamation Act of 1902 directs that:

> [N]othing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation.

Later, Congress enacted the Federal Power Act in 1920. Section 27 of the FPA contains language almost identical to Section 8 of the Reclamation Act of 1902. The historical anomaly is that the Courts have not interpreted these two nearly identical provisions -- Section 8 of the Reclamation Act and Section 27 of the Federal Power Act -- in the same manner.

In California v. United States, 438 U.S. 645 (1978) the United States Supreme Court decided that the State of California may impose any condition in an appropriative water rights permit issued to the United States for a reclamation project not inconsistent with congressional directives. Later, on remand and on a subsequent appeal, the Ninth Circuit concluded that all the conditions imposed by the State of California in its

appropriative water rights permit were valid. That decision did not question the authority of the Federal Government to supersede state water law by virtue of the Commerce Clause, Property Clause and Supremacy Clause of the U.S. Constitution. The State of California acknowledged this authority throughout the appellate review of this case. Rather, the State of California's argument was that Congress expressly chose not to exercise that authority, when Congress enacted Section 8 of the Reclamation Act except where state water law contravened some other specific Congressional directive. The U.S. Supreme Court agreed with this analysis.

In contrast, in First Iowa Hydro-Elec. Coop. v. F.P.C., 328 U.S. 152 (1945) the United States Supreme Court concluded that an F.P.C. licensee need not comply with state water laws despite Section 27 of the F.P.A. Though some legal scholars may argue that a comparison of the legislative history of the Reclamation Act and of the Federal Power Act justifies these different conclusions, a careful analysis discloses no basis for this contention. The parallel of the language between Section 8 of the Reclamation Act and Section 27 of the FPA is too close for such a conclusion to be correct.

The FERC should not possess the authority absent a specific statutory directive from Congress to override state substantive law regarding the appropriation of water in an arid state such

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as the State of Idaho. Water is a very precious resource to a state whose economy is largely based on irrigated agriculture. The FERC has not demonstrated its willingness or sensitivity to the varied water problems of an arid state.

Examples of the abuses that occurred as a consequence of the interpretation by the U.S. Supreme Court in the First Iowa case abound. The following are a few examples of abuses that have occurred in the State of Idaho.

The first example concerns an issue that is of fundamental importance to a state whose economy is substantially based on irrigated agriculture. The operation of hydroelectric facilities must be subordinated at least partially to future upstream consumptive uses, and the State of Idaho has long had a policy of requiring subordination. Recently, the State of Idaho has modified its policy to provide for partial subordination in some cases, as explained in detail later.

In the proceedings before the F.P.C. regarding the Brownlee/Hells Canyon/Oxbow complex of Idaho Power Company on the Snake River, much testimony was heard and documents were introduced to demonstrate the need for a subordination provision in the F.P.C. license for those projects. The F.P.C. ultimately included such a provision at the request of then Governor Len B. Jordan. More recently, the FERC has reversed its position on

subordination and refused to include such a provision on a license issued to Boise Cascade Company.

Boise Cascade filed an application for the Horseshoe Bend hydroelectric project on the Payette River. The Idaho Department of Water Resources filed a motion to intervene and asked the FERC to subordinate the operation of the project to future upstream consumptive uses. The FERC issued an order issuing the license for the Horseshoe Bend Project in July, 1986 and refused to include any subordination provision in the license. If the FERC implements this decision for other projects in Idaho, it will cause major expensive and protracted litigation to seek court review and reversal of the First Iowa decision.

The reason for this is the potential impact on irrigated agriculture -- the state's economic base. Hydroelectric facilities typically are designed and constructed to utilize a major portion of the high water flows in the spring and early summer; such facilities will use practically all the flow during the later summer irrigation season. If the operator of the hydroelectric facility has a right to the water prior to future irrigation development, the consequence is that the irrigation development could not use water during the major portion of the summer irrigation season, when the farmer needs it the most. The failure to subordinate, at least in part, the operation of a

hydroelectric facility to upstream consumptive uses would freeze most agricultural development at today's level. That consequence is totally inappropriate for an arid state such as Idaho.

The State of Idaho also recognizes that the production of electric power in hydroelectric facilities promotes economic development of the states and that a tradeoff occurs between consumptive water uses that deplete stream flows and the nonconsumptive use of those same stream flows at hydroelectric facilities. The State of Idaho had to address this tradeoff as a result of several lawsuits involving the water rights of Idaho Power Company to use water in hydroelectric facilities on the Snake River. Ultimately, the State of Idaho reached a settlement with Idaho Power Company. As part of this settlement, the State of Idaho enacted legislation that made four major modifications, among others, to state laws regarding the appropriation of water. First, the new laws protected Idaho Power Company's hydropower water rights on the Snake River above the Murphy Gauge up to certain minimum flows. Second, the new laws placed in trust any portion of the water rights for power purposes in excess of the level set for the minimum flows. Third, the new laws authorized the reallocation to consumptive users of the trust waters, if the future user meets certain stringent criteria. Fourth, the new laws set up a procedure to

protect a portion of the water right for hydropower purposes on any stream systems in the state.

This settlement represented an accommodation of both the utility's desire to retain some protectable water right and the future consumptive water user's desire to proceed with some future development. The settlement was reasonable and served the people of the State of Idaho well.

The Idaho Power Company in 1985 submitted the settlement agreement to the FERC for approval as an amendment to the FERC licenses of the Idaho Power Company. The FERC has not yet acted on this filing.

A second example concerns a blatant disregard by the FERC of state substantive water law. In 1981 the State of Idaho amended Idaho Code § 42-205 to prohibit the appropriation of water for hydropower development uses within man-made irrigation facilities (or the use of those facilities) without the permission of the owner. The rationale of the law was straightforward. The owner of an irrigation facility should derive the benefit of any hydropower development that occurs at the irrigation facility.

Late in 1981 the City of Ashton, Idaho and Idaho Renewable Resources, Inc. filed an application for preliminary permit for

use of the irrigation facilities called the Milner-Gooding Canal at a site commonly called "Dietrich Drop". The owners of the Milner-Gooding Canal, American Falls Reservoir District No. 2 and Big Wood Canal Company, filed a later in time competing application with the FERC. The owners claimed that they were best able to optimize operation of the hydroelectric project because they own, operate and maintain the Milner-Gooding Canal. The District had already filed an application for a water rights permit with the State of Idaho for the proposed hydropower use. Furthermore, the Idaho Department of Water Resources intervened and pointed out to the FERC that Idaho Code § 42-205 would preclude the City of Ashton, Idaho and Idaho Renewable Resources, Inc. from obtaining a water right under state law for the proposed hydroelectric project.

Despite the state statute, the FERC issued the preliminary permit to the City of Ashton, Idaho and Idaho Renewable Resources, Inc. Fortunately, for a variety of reasons not relevant here, the parties largely resolved their differences and filed a joint application for a major license.

The FERC's insensitivity to state law and concerns is apparent. The City of Ashton, Idaho, a municipal corporation, was a co-applicant for the Dietrich Drop Project. If the FERC had followed through in a licensing proceeding with a like order, the apparent legal effect would have been to vest in a

municipal corporation of the State of Idaho -- a creature of the state that derives its existence, powers and duties from state law -- the power to act in disregard of the laws of its creator!

This example is reminiscent of the ten year fight that occurred in the State of Washington over the construction of two hydroelectric dams on the Cowlitz River by the City of Tacoma. [See, State of Wash. Dept. of Game v. F.P.C., 207 F.2d 391 (9th Cir. 1953); cert. denied, 347 U.S. 936 (1954); City of Tacoma v. Taxpayers of Tacoma, 49 Wash.2d 781, 307 P.2d 567 (1957), rev'd, 357 U.S. 320 (1958).] In that case the Federal Power Commission, predecessor of the FERC, approved a major license for a hydroelectric project of the City of Tacoma, which authorized the City of Tacoma to violate state law in several respects, including noncompliance with state water laws.

The State of Idaho has other problems with the FERC. Section 10 of the FPA requires that all FERC licenses shall be subject to the conditions that the project adopted "shall be such as in the judgment of the Commission will be best adopted to a comprehensive plan for improving or developing a waterway ... for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes." Despite this statutory directive the FERC largely ignores state planning -- a major information source for this

comprehensive planning. The individual state will always be in better position to know a natural resource within its boundaries and to make informed judgments about its best use than an agency located in Washington, D.C.

Another problem the State of Idaho has with the FERC concerns Opinion No. 199 issued by the FERC in November, 1983. That opinion determined that Washington Water Power Company should pay to the Coeur d'Alene Indian Tribe an annual charge for use of the bedlands of the southern end of Lake Coeur d'Alene. The State of Idaho claims these lands under the Equal Footing Doctrine. While the FERC decision purports not to determine the title of the State of Idaho, the FERC has no business making any determination relating to title in such a dispute. Other forums have the competence to make such determination! Not the FERC!

The State of Idaho's final concern relates to state endowment lands which the Congress granted to the people of the State of Idaho in sacred trust for the support of public schools, universities and charitable institutions. The FERC has required a FERC licensee to acquire fee title to State of Idaho endowment land even though the FPA does not require such acquisition. An easement for the period of the term of the license would more than adequately satisfy any requirement of the FPA. Since the Congress granted the state endowment lands

to the State of Idaho for the support of certain public institutions, the FERC should not thwart this Congressional purpose in its administration of the FPA.

For the reasons stated herein, the State of Idaho urges Congress as a result of these oversight hearings to enact a legislative solution to these problems. If remedial legislation is contemplated, the State of Idaho would like to participate in drafting the legislation.

STATE OF
MINNESOTA
DEPARTMENT OF NATURAL RESOURCES

BOX , 500 LAFAYETTE ROAD • ST. PAUL, MINNESOTA • 55146

DNR INFORMATION
(612) 296-6157

SEP 09

August 29, 1986

Senator James McClure
Chairman, Senate Committee on
Energy & Natural Resources
SD - 358 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator McClure:

The State of Minnesota is most interested and concerned regarding the amendments to the Federal Power Act pertaining to licensing requirements of the Federal Energy Regulatory Commission (FERC). We appreciate the opportunity to provide this written statement for inclusion in the record of the oversight hearing conducted by your committee on September 12, 1986.

Minnesota's interests and concerns relate primarily to those sections of the existing Federal Power Act and the amendments proposed in S426 relating to FERC responsibilities and authorities during its licensing, relicensing and exemption processes with respect to: recognition and compliance with state laws and plans; provision for equitable consideration of fish and wildlife, flood damage prevention, navigation, irrigation, recreation, cultural resources, tourism, agriculture and other aspects of environmental quality; and assurance that FERC will revoke a permit, license or exemption for a significant violation of its terms including compliance with state laws and regulations.

Specifically, Minnesota supports the position of the Western States Water Council as set forth in the Congressional Record of April 17, 1986 by Senator Baucus relating to changes in the Federal Power Act which will insure that FERC will not preempt state water management and allocation laws and plans during federal hydropower licensing, relicensing or exemption procedures. Although Minnesota operates under Riparian water law as opposed to the Appropriation Doctrine of the western states we have the same fundamental purposes relating to state's sovereignty over waters within the states. It is our contention that the original intent of Congress in the Federal Power Act was to protect State laws relating to the control, appropriation and distribution of water as enunciated in Sections 9 and 27 of the Act. However, court actions as well as regulatory actions by FERC in past years have led to a marrowing of that congressional intent. We feel that action must be taken by Congress to more clearly reflect the recognition of states' sovereignty over their water resources and to mandate FERC recognition of state rights, laws and plans. A true federal-state partnership cannot be attained in an atmosphere of conflict. Congressional action which will provide for clarification and recognition of state's rights will prevent such conflict.

Minnesota has had for a number of years, a considerable body of laws protecting the quality of the state's environment and we are proud of the position of the state as having a high "Quality of Life". We therefore feel strongly that Congress should clearly require FERC to set conditions in its licensing and exemption procedures which will assure protection of environmental quality in hydropower developments.

We also believe that FERC should be required to fully explain its reasons for rejecting any conditions recommended by state and federal water quality and fish and wildlife agencies and that FERC should be mandated to revoke a permit, exemption or license for a significant violation of its terms.

We believe that Minnesota's position on these issues is consistent with the general views and policy position of the Western States Water Council, the Upper Mississippi River Basin Association and the Interstate Conference on Water Problems and are representative of the position of the majority, if not all, of the states.

Thank you for the opportunity to provide these comments. We appreciate the Committee's interest and concerns in this vital issue relating to our water resources.

Yours very truly,

Joseph N. Alexander
Commissioner

JNA/GH:fw

cc: Senator David Durenberger
Senator Rudy Boschwitz

SEP 15 1986

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ODNR
OHIO DEPARTMENT OF
NATURAL RESOURCES
Fountain Square
Columbus, Ohio 43224

September 16, 1986

The Honorable James A. McClure
United States Senator
Chairman, Committee on Energy & Natural Resources
358 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator McClure:

The Ohio Department of Natural Resources appreciates this opportunity to submit a statement for the record in support of other state natural resources agencies and the Western States Water Council about the current interpretation of the Federal Power Act by the Supreme Court which allows preemption of state water laws and resources planning by the Federal Energy Regulatory Commission (FERC). These Supreme Court decisions have effectively abridged an individual state's authority over the allocation, diversion, and use of water and the siting of hydropower facilities, and have placed this control under the FERC's hydropower licensing process. This interpretation appears to be contrary to the Federal Power Act itself which recognized state jurisdiction over waters.

Some of the FERC's regulations, at least on the surface, would appear to defer to state concerns about hydropower sites, fish and wildlife, minimum streamflows, and other water resources and rights issues. However, the states have no assurance that the FERC will have full appreciation or knowledge of the concerns even though they may become a part of an FERC license or exemption. Our experience in Ohio has shown that the limited FERC staff, stationed in Chicago, has difficulty in keeping up with operational problems at local hydropower facilities and then with promptly enforcing terms and conditions of licenses or exemptions. Unfortunately, it appears that the regional FERC office must receive direction for dealing with most of these operational problems from its Washington headquarters.

While the need for certain federal regulation of the use of commercial waterways for hydropower is recognized, the state must retain certain primary legal rights for the allocation, diversion, and use of water and the siting of power generating facilities. The resolution of the Western States Water Council, printed in the Congressional Record of April 17, 1986, appears to generally address our concerns about this issue. We encourage your Committee's consideration of appropriate changes in the Federal Power Act.

Thank you for the opportunity to present our views and concerns on this matter.

Sincerely,

JOSEPH J. SOMMER
Director

JJS/djh

cc: Senator Howard Metzenbaum
Senator John Glenn
State of Ohio Washington Office

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

TED SCHWINDEN, GOVERNOR 1520 EAST SIXTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699 HELENA, MONTANA 59620

August 19, 1986

Bob Stamper, Director
Ohio Power Siting Board
180 East Broad Street
Columbus, OH 43266-0573

Dear Mr. Stamper:

As you know from our telephone contact, during the April 7, 1986 Senate discussion on the Electric Consumer Protection Act of 1986, Montana Senator Baucus raised the issue of current Supreme Court interpretation of the Federal Power Act that allows total federal pre-emption of state water resource plans and existing water rights. Senator McClure of Idaho, chairman of the Senate Energy and Natural Resources Committee, agreed that the problem was serious, and warranted a hearing before his committee. Senator McClure has called the hearing to solicit testimony on the role of federal pre-emption in the Federal Power Act. Specifically, the hearing will focus on the effects of FERC hydropower licensing decisions on state water law and resource planning.

The hearing is a significant opportunity for the States to impress upon Congress the increasing problems of federal interference in areas of traditional state authority. Whether riparian or appropriative, all States have an interest in their ability to control resources within their boundaries. We are requesting your state to present testimony, either written, oral, or both, so the committee will appreciate the necessity of returning to the balance of power originally envisioned in the Federal Power Act. We hope the hearing will ultimately result in Senate passage of our amendments of the Federal Power Act, but we must be able to present specific examples of federal interference with State resource planning.

I will be testifying before the Committee in Washington, D.C. on behalf of the State of Montana. If someone from your State cannot attend, we encourage you to submit written testimony for the record of the hearing. The hearing has been scheduled for Friday, September 12, 1986, at 10:00 a.m. in Room SD 366 of the Dirksen Senate Office Building in Washington, D.C. The attached excerpt from the August 15, 1986, Congressional Record provides information on how to make arrangements for oral testimony and how to submit written testimony.

For your information, we've enclosed the Senate colliquy that led to calling of the hearings. Also enclosed is a copy of amendments proposed by the Western States Water Council and the State of Montana, a paper entitled "State Concerns with the Federal Power Act" including a synopsis of those amendments, and the position statement of the Western States Water Council .

We appreciate your cooperation on this matter of vital concern to all states. Please do not hesitate to contact us with any question or concerns you have. Sarah Bond (Legal),and Susan Higgins (Water Resources), can be reached at 406-444-6637. Alan Davis (Energy, Facility Siting) may be contacted at 406-444-6697.

This is the first opportunity the states have had to amend the Federal Power Act to return to the states jurisdiction over their natural resources without upsetting the obvious national interest in power production and regulation.

I will be in Washington on September 11, 1986, and would be happy to meet with other state representatives at that time to coordinate oral or written testimony. In Montana, I can be reached at 406-444-6699, and in Washington, through Rich Bechtel the state/federal coordinator for the Governor of Montana, 206-624-7748.

Sincerely,

Larry Fasbender

Larry Fasbender
Director
Montana Dept. of Natural Resources
and Conservation

cc: Robert Goettemoeller, Chief, Division of Water, OH Dept. of Natural Resources

Encl.

Excerpt from the Congressional Record, August 15, 1986

Page S 12002

MR. McCLURE: Mr. President, I would like to announce for the information of the Senate and the public that the Committee on Energy and Natural Resources has scheduled an oversight hearing on Friday, September 12, 1986, at 10 a.m., in room SD-366 of the Dirksen Senate Office Building in Washington, DC.

The purpose of this hearing is to receive testimony on the consideration of applicable water law during the Federal Energy Regulatory Commission's hydroelectric licensing proceedings.

Those wishing to testify or who wish to submit written statements should write to the Committee on Energy and Natural Resources, room SD-358 Dirksen Senate Office Building, Washington DC, 20510.

For further information, please contact Mr. Russell Brown at (202) 224-2366.

DNRC
8/7/86

STATE CONCERNS WITH THE FEDERAL POWER ACT

THE ISSUE

1. The federal government, recognizing the inherent need for state sovereignty over waters within each state's boundaries, passed control of water to States at the time of their admission to the union.

2. As demand for limited water supplies increases, the need for effective State control of water allocations becomes critical. States must respond by exercising their water management authority. Federal preemption of this prerogative frustrates state efforts to resolve increasingly complex water allocation problems.

3. Increasingly, States are regulating siting of major power facilities, but Federal pre-emption of hydropower facility siting reduces the effectiveness of state planning and siting.

4. The Federal Power Act (FPA) recognized State jurisdiction over waters, as well as the need for some national regulation of the use of commercial waterways for hydropower, and achieved a delicate balance of State/Federal authority in sections 9 and 27.

5. The Supreme Court, in a strained interpretation of FPA's deference to State water laws, took all authority away from States in the First Iowa case. Since the FPA pre-empts State authority, the authority over hydropower water allocation effectively rests with the Federal government through FERC. Because of court interpretation of Congressional Commerce Clause authority, FERC extends it's power even to completely instrastate waters, thus preventing State management and allocation of strictly local waters.

6. The end result is that FERC has given itself the authority selectively to authorize violation of State laws. This has created many problems. They are:

THE PROBLEMS

a. Federal/State conflicts occur because FERC pre-empts State decisions which States have responsibility to make (i.e., states must exercise sovereignty over State water, but now are unable to do so).

b. Despite regulations seemingly deferential to State concerns, siting of major hydro projects and use of vast amounts of water takes place with inadequate federal consideration of State-level concerns. States can present local mitigation strategies only by intervening in the FERC proceeding, which is extremely costly and time consuming.

c. States have no assurance that FERC will have an appreciation and knowledge of their concerns or will adopt their proposed conditions. Experience has shown this, and FERC staff readily admit their difficulty in keeping abreast of local resource issues.

E. A hydropower developer may presently obtain a FERC license long before having obtained the necessary State water rights to operate the project. Once the FERC license is issued however, all State authority governing existing water rights is pre-empted. The State's jurisdiction over property rights on water is effectively destroyed and FERC licensees are empowered to condemn existing water rights of ranchers, farmers, or other users.

POSSIBLE SOLUTIONS

1. Place hydroelectric regulation with the States and remove this function from FERC — this is not a reasonable solution.

Placing all hydroelectric regulation with the States may not be feasible. There is still a "national interest" to be served by having FERC review, permit and regulate facilities affecting the national waterways. However, this function is becoming less important as most of the large national projects are already built. There are few major hydroelectric sites left for such projects. Most of the new projects will be serving local needs, will be built on smaller streams, and will create only local impacts, although the complex system of energy regulation, e.g., siting, rate regulation, etc., should remain at the federal level. It still is reasonable to have FERC making siting decisions, but not without prior deference to state concerns and issues.

2. Force FERC to change its administrative procedures and requirements to address the problems raised — this is not a reasonable solution.

Montana does not think the problem can be solved administratively. As the current regulations are not directly contrary to Court interpretation of the FPA, there is no means, without amending the statute, to force FERC to make the necessary changes. FERC recently revised its regulations regarding authorization of hydropower permits, exemptions, and licenses. These changes incorporated Commission decisions, and clarified existing practices. FERC'S response to the comments on the notice of proposed rulemaking, and explanation of its final rules vividly demonstrates why an administrative solution does not exist. In fact, the requirement that the State water right be obtained prior to the FERC procedure (for exemptions only) was suggested to FERC in its rulemaking process. FERC initially rejected the idea, but stated it would further investigate the possibility. Even if FERC determined administratively that exemptions be issued only after a State permit has been obtained, the licensing procedure for major projects would not be affected.

In the new regulations, FERC has established itself as the preeminent authority and has delegated to itself the right to allow an applicant to violate State law if FERC determines the violation to be in the public interest. This latest FERC interpretation of its Congressional authority is the clearest indication that FERC cannot be controlled under the current statute. There is no Congressional authorization for this exercise of Federal authority in direct violation of the laws of the affected States, but existing case laws supports the concept.

b. The Committee amendments require FERC solicitation and consideration of comprehensive Federal or State plans regarding the waterway, Federal and State agency and affected Indian tribes' recommendations for license issuance or conditions, and, explanation in writing of its reasons for rejecting or modifying any conditions proposed by other state or federal agencies or Indian Tribes. Montana's amendments add facility siting and water management agencies to the agencies that FERC must consult and require FERC explanation for rejecting or modifying any purposed conditions to be included in its order issuing the license.

c. Montana's Section 12 amends Section 9 "Information to Accompany Application for License" (16 USC § 802), to clarify that the FPA does not pre-empt State water laws. Section 12 of S. 426 adds a section to the FPA that "nothing therein shall be construed to authorize the appropriation of water or alter or establish any state, federal, or private water related rights". This is insufficient to overcome prior court construction of the FPA. The current language in Section 27 (16 USC§ 821) is already stronger than the S. 426 language. Section 12 of Montana's amendments completely replaces the Committee's Section 12. Montana proposes to amend Section 9 to state the Commission shall not issue an original or new license, amendment to a license, or exemption from licensing unless the applicant, through the license application, proves acquisition of the necessary state rights to use water.

d. Section 13 amends Section 21 of the FPA (16 USC§ 814) to repeal FERC's authority to authorize licensees to condemn water rights. A license applicant would be governed by applicable state law and procedure in all condemnation actions for water rights.

e. Section 14 adds to Section 27 of the FPA, "State Laws and Water Rights Unaffected" (16 USC§ 821), the need for a license applicant to comply with State substantive and procedural laws, including the assessments of fees, and that such compliance is not an undue burden on interstate commerce.

f. Section 15 adds to FPA Section 6 (16 USC§ 799) that the Commission is not empowered to include in any of its authorizations any terms or conditions inconsistent with terms and conditions of any state property right for the use of water for the project.

4. No action. This is unacceptable. The problems are simply too great to allow the current situation to continue.

Mr. BAUCUS. Mr. President, I was prepared to offer amendments to S. 408 to require FERC licensees to conform to State water law. My amendments would have provided that prospective water power projects must obtain water rights under State law before obtaining a FERC license; that FERC cannot authorize exercise of eminent domain powers to obtain water rights; and that FERC license terms cannot be inconsistent with terms of the State water use authorization.

I believe that section 27 of the original Federal Power Act articulated Congress' intent not to preempt State water law. Instead, under the Supreme Court's current interpretation of the law, FERC is only required to consider State resource plans and the recommendations of appropriate State agencies when evaluating license applications.

With the recent proliferation of applications for FERC licenses, there is growing concern about how new water projects could affect State resource plans and existing water rights. My amendments would require FERC licensees to obtain water rights under State laws and State procedures, and would prevent situations where FERC licensees might deprive a rancher or other water user, either upstream or downstream, of his established water rights.

For example, under current law FERC could grant a license to site a project on a river which has been fully adjudicated among current users. The FERC license would upset the State adjudication, and the licensee could force a rancher or other water user to sell his water right. In addition, it is unclear how interstate compacts and compacts with Indian tribes could be affected by FERC licensing decisions; based on Supreme Court interpretations of current law, it appears that a FERC licensing decision could affect such compact agreements. These possibilities are critically important to many States, tribes, and individual water users; they raise serious questions about States' rights and the appropriate role of FERC, and I think they warrant immediate investigations.

I am aware, Mr. President, of the controversial nature of these amendments. This is a complicated area of law. I have discussed my proposals with the distinguished chairman of the Energy Committee, and he has agreed to hold a hearing on this matter during this Congress so that the committee can consider the proper role of State water law in FERC licensing procedures.

Mr. McCLURE. Mr. President, the Senator from Montana is correct. I share his concerns about how these power projects affect State resource planning. I agree that the committee should examine his proposals and the effects of pre-emption on State resource planning and existing water compacts.

I appreciate the Senator's cooperation in not offering his amendments for full Senate consideration at this time, and I can assure him that I will work with him and schedule a hearing at an appropriate time during this Congress.

Mr. BAUCUS. I thank the Senator. With that understanding, I will not offer my amendments today to S. 408. I look forward to working with the chairman and with other members of the Energy Committee in exploring these important issues.

Mr. President, these amendments are supported by the Western States Water Council. I ask unanimous consent that a resolution adopted by the council appear in the RECORD.

There being no objection, the resolution was ordered to be printed in the RECORD, as follows:

POSITION OF THE WESTERN STATES WATER COUNCIL CONCERNING AMENDMENT OF THE FEDERAL POWER ACT

Whereas, needless controversy has been caused by conflicts between the licensing procedures of the Federal Energy Regulatory Commission (FERC) and established principles of Western States water law; and

Whereas, FERC has been unwilling to modify its procedures to relieve these conflicts; and

Now, therefore, be it resolved by the Western States Water Council that the Federal Power Act (16 U.S.C. 791(a) *et seq.*) be amended as follows:

1. Strike from subsection (b) the following language ". . . and to the appropriation, diversion, and use of water for power purposes . . ." Add the following new subsection after subsection (a):

"(a) Notwithstanding any other provisions of law, the commission is prohibited from issuing an original or new license, amendment to license, or exemption from licensing under this Part, unless the applicant proves acquisition, in accordance with applicable substantive and procedural provisions of state law, of the necessary rights established pursuant to state law to appropriate, divert, and use water for power purposes."

2. To Section 21 add the following new sentence:

"The commission is not empowered to authorize a licensee to exercise the right of eminent domain pursuant to this section for the purpose of acquiring water rights."

3. In Section 27 designate the existing sentence as subsection (a) and add the following additional subsections:

"(b) Nothing in this Part shall be construed as conferring upon the United States, its agents, permittees, or licensees any right to acquire rights to appropriate, divert, or use water.

(c) Appropriation of water for power purposes subject to this Part shall be pursuant to substantive and procedural provisions of State statutory law, decisional law, and regulations governing appropriation, diversion and use of water.

(d) Establishment of, and compliance with, pursuant to State law, terms of conditions, including licenses, or other entitlements for appropriation, diversion or use of water for power purposes, shall not be deemed to constitute a burden on interstate commerce.

(e) Nothing in this Part shall alter in any way any provision of State statutory law, decisional law, or regulation, or of any interstate compact, governing the appropriation, diversion, or use of water."

4. To Section 6 add the following provision after the second sentence:

"The commission is not empowered to impose any terms or conditions in any original or new license or amendment to license which are inconsistent with the terms and conditions established pursuant to State law in any permit, license, or other entitlement for appropriation, diversion, or use of water for the project authorized by the license or amendment."

POSITION
of the
WESTERN STATES WATER COUNCIL
Concerning
FEDERAL ENERGY REGULATORY COMMISSION LICENSING
and
STATE WATER RIGHTS
April 22, 1983

I. BACKGROUND

Federal law, specifically the Federal Power Act, requires the Federal Energy Regulatory Commission (FERC) to license any hydroelectric plant which: (1) is located on federal land; or (2) uses water impounded by a federal dam; or (3) is located in or uses water from a navigable stream or (4) produces power which affects interstate commerce. The terms "navigability" and "interstate commerce" have been broadly interpreted such that the vast majority of hydroelectric developments require compliance with FERC licensing or exemption procedures.

Because hydropower is generated by the flow of water, the right to use the water for the purpose of generating power must be obtained. This means that, in the western United States, where the doctrine of prior appropriation governs water rights, a hydro developer must obtain an appropriative water right.

Under the appropriation doctrine water is declared the property of the state or public. The essence of the creation of an appropriative water right is application of the water to a legislatively defined beneficial use. The right, allowing continued beneficial use, is then protected against subsequent appropriations. Application of this principle promotes stability of existing economies predicated upon water use and insures maximum beneficial use as defined by the public.

Congress and the Supreme Court have approved the implementation of the appropriation doctrine by the western states. Through congressional action, western land was "severed" from western water and traditional (prior appropriative) western methods of allocating and administering water rights were approved. Although the United States Supreme Court has noted recently that congressional deference to state water law has not amounted to total relinquishment of federal authority, more often than not, Congress has included a statement of specific deference to state law in significant congressional acts affecting water resources.

Such is the case with the Federal Power Act. Section 9 of the Act requires applicants to provide evidence of compliance with state water law. Section 27 states that nothing in the Act is to affect state law relating to the control, appropriation or distribution of water. However, these provisions were interpreted narrowly by the Supreme Court in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946). In

electricity at what amounts to a "premium price" from any small supplier with power to sell and (3) a section of the 1980 Crude Oil Windfall Profit Tax Act which created an investment tax credit for small hydro development. These incentives have caused the number of preliminary applications filed with FERC to increase from 36 in 1978 to approximately 600 in 1980 to approximately 1800 in 1981. The average number of filings per year before 1978 was approximately 4. The dramatic increase has led some experts to note that many claims are being filed solely to tie up hydro sites for speculation and claim jumping purposes. Regardless of the motive, the increase in filings has illuminated a number of concerns. These concerns relate to the overlapping nature of the authority of FERC to license hydro plants, and that of state water administrators, to grant the water rights necessary to turn turbines in those plants. The following will describe these concerns in detail.

II. STATE CONCERNS

A. Water Rights and Order of Application

Although FERC requires various exhibits to be filed with preliminary permit applications, it requires no proof of an applicant's ability to obtain a right for the water necessary for the proposed development. Other factors relating to the development being equal, the first potential developer to obtain a preliminary permit will be awarded the FERC license. Thus a FERC applicant can obtain FERC approval and encouragement to pursue development of a hydro site, without any possibility that it can obtain a right under state law to use the water essential for the development.

The following situation demonstrates this problem. American Falls Reservoir District No. 2 and the Bigwood Canal Company own and operate the Milner-Gooding Canal in Lincoln County, Idaho. Located on the canal is the Dietrich drop-site. American Falls and Bigwood intended to develop a hydro project at the site and obtained a hydropower water right from the state of Idaho with a priority date of September 15, 1980. On May 25, 1982, FERC granted a preliminary permit to develop the site to Idaho Renewable Resources, Inc. and the City of Ashton, Idaho. In its license order FERC concluded that there were not significant substantiated differences in the plans for development presented by the parties. Idaho law provides that, with regard to man-made irrigation facilities, water cannot be appropriated for hydropower development without the permission of the owner of the facilities.

The FERC order issuing the preliminary permit to Idaho Renewable Resources, Inc. and City of Ashton, Idaho results in one party having the FERC approval to develop the site while another party, which was in competition with the first for the FERC license, is the only entity which can obtain the necessary water right under state law. Idaho regards the FERC action as being in blatant disregard of state water law.

of the 75 cfs flow required by FERC. The state has little motivation to enforce the minimum flow since there has been no compliance with state law nor mutually agreeable policy for protection of the flows. It is questionable whether FERC is in a position to act as an enforcing entity.

The state of Idaho has also experienced difficulty with FERC's establishment of minimum flows. Idaho, like Montana, is not adverse to the concept of minimum flows for fish and other uses, and has specific statutory procedures by which such flows can be established. However, Idaho has met with little success when it has attempted to describe to FERC the provisions of Idaho law relating to instream flows, and the problems created by FERC's lack of compliance with those provisions. The state has received no acknowledgement of its written communications, no acknowledgement of the problem and no cooperation in seeking a resolution.

The state of Texas has had similar problems with the establishment of minimum instream flows by FERC. As part of its requirements for the 50-year renewal of the FERC (FPC) license of the Possum Kingdom Dam on the Brazos River in Texas, FERC disregarded state law and the wishes of state citizens and attempted to establish minimum instream flows below the dam. Although it now appears that the problem has been satisfactorily resolved, the resolution was reached only after expenditures of a tremendous amount of time and money by the state and its citizens.

The state of Washington, with vast hydro development, has experienced different problems relating to instream flows. According to its experience, FERC does not consider nonfishery instream uses, such as aesthetics, recreation, navigation, and water quality, in determining instream flow reservations. These aspects must be considered by the Washington Department of Ecology under state law. Yet the state water resource agency's recommendations, based upon its legally mandated, multifacited considerations, are not respected by FERC. This may result in the establishment of two minimum flow requirements; one by the state of Washington and the other in the exemption or license issued by FERC. In addition to the inherent conflict of the "competing" requirements are questions of enforcement of the minimum flow requirements.

C. Foreclosure of Upstream Uses

Another concern related to the imposition of minimum instream flow occurs where applicants have acquired a state water right permit for a hydro site after receiving necessary FERC approval. Since many state statutory schemes require that, when water is available, a requested provisional permit must be issued to an applicant, a hydro developer could call for the entire unappropriated flow in a water course. This would effectively preclude future agricultural, municipal and other consumptive uses above a hydropower project. Where FERC licensing decisions are made without consulting state water use plans, considerable conflicts can occur. The Noxon Rapids Hydroelectric project in western Montana is a prime example of this problem. It has virtually

The proposed amendments to the Federal Power Act (copy attached) would alleviate most of the state concerns described above. There would be no issuance of FERC permits, licenses or exemptions unless the permittee could prove the ability to acquire necessary state water rights. Instream flow appropriations would also have to be made in accordance with state law and pursuant to state water planning decisions.

IV. CONCLUSION

The western states submit that their many years of experience in balancing competing interests in the use of water make them best qualified to continue to have primary legal responsibility to allocate water rights. FERC is in no position to assume this responsibility. Yet FERC, in its licensing procedures, seems intent on disregarding state water law. Requiring compliance with state water right laws would not only protect the western state systems of water law, but would assist FERC by assuring that the applicants before it are serious enough about developing a hydro site to have complied with state water right laws and procedures.

Given the tremendous increase in FERC filings during the last two or three years, and the "lagtime" in the FERC licensing procedure, only the "tip of the iceberg" has surfaced with regard to potential conflicts between FERC and the water administrators of the prior appropriation states. The concerns listed above will not vanish. Some sort of resolution will occur. Prudence dictates a resolution which allows all parties to carry out their traditional and legally mandated responsibilities.

In this regard, language from the most recent decision in United States v. California, is instructive. The Supreme Court remanded the case to the district court for determination of which of the conditions placed on the federal project by the State of California could be upheld. The district court decision was appealed to the Ninth Circuit which, in upholding all of the California conditions, stated:

> There is a preference, in interstate water cases, for "negotiation," "mutual accommodation and agreement," rather than litigation [citations omitted]. A similar preference applied in cases where we are asked to arbitrate complicated and delicate questions of federalism.
>
> In legal terms, these principles require the United States, at a minimum, to attempt to reconcile its interests with California law before a court can override the state's position as conflicting with federal policy. The precepts of federalism, if followed, should produce mutual respect and accommodation for state interests... The United States may not justify its demands simply as a raw exercise of superior authority. United States v. California, Nos. 81-4139x and 81-4309x (9th Cir. 1982) Slip Opinion at 11.

MONTANA'S FEDERAL POWER ACT AMENDMENTS

MONTANA'S PROPOSED AMENDMENTS TO THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE'S "JOINT STAFF COMPROMISE" AMENDMENTS IN THE NATURE OF A SUBSTITUTE FOR THE WALLOP-JOHNSTON SUBSTITUTE

NOVEMBER 1, 1985

(The following is the proposed Joint Staff Compromise. Montana's amendments to the compromise are presented in FULL CAPS.)

Strike everything after the enacting clause and insert the following:

That this Act may be referred to as the "Electric Consumers Protection Act of 1985."

Sec. 2. Sec. 7(a) of the Federal Power Act (16 U.S.C. 800(a)) as amended, is further amended--

(a) by inserting "original" after "hereunder or"; and

(b) by striking "and in issuing licenses to new licensees under section 13 hereof".

Sec. 3. Section 10 of the Federal Power Act, as amended is further amended--

(a) after "water-power development," by inserting "for the adequate protection, mitigation, and enhancement of fish and wildlife,";

(b) after "including", by inserting "irrigation, flood control, water supply and";

69-076 O - 87 - 7

(c) by AMENDING SUBSECTION (a) TO READ:

"(a) CONFORMANCE WITH STATE WATER LAW

THAT THE LICENSEE HAS ACQUIRED, IN ACCORDANCE WITH THE SUBSTANTIVE AND PROCEDURAL PROVISIONS OF STATE LAW, THE NECESSARY RIGETS ESTABLISHED PURSUANT TO STATE LAW TO APPROPRIATE, DIVERT AND USE WATER.",

BY redesigning existing subsection (a) as paragraph (ab)(1) and by inserting the following new paragraphs:

"(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (ab)(1), the Commission shall consider:

"(A) the extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing or conserving a waterway or waterways arfected by the project that is prepared by--

"(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; and

"(ii) the State in which the facility is or will be located; and

"(B) the recommendations of Federal and State agencies exercising administration over WATER MANAGEMENT, FACILITY SITING, fish and wildlife, flood control, navigation, irrigation, recreation and cultural resources of the State in which the project is located, and the recommendations of Indian tribes affected by the project;

"(3)(A) Upon receipt of an application for a license, the Commission shall solicit recommendations for proposed terms and conditions to be included in the license from the STATE AND FEDERAL agencies and Indian tribes identified in paragraph (a)(2) of his section.

"(B) If any recommendation for a proposed term or condition is received by the Commission at least 30 days prior to issuing any licenses under this section, the Commission shall explain in ITS ORDER ISSUING ITS LICENSE ~~WRITING~~ its reason for rejecting or modifying any such proposed term or condition.".

Sec. 3 4. Section 15 of the Federal Power Act (16 U.S.C. 808), as amended, is further amended--

(a) by striking subsection (a) through "terms and conditions to a new licensee," and inserting in lieu thereof "Sec. 15 (a). If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain and operate any project or projects of the licensee, as provided in section 14 of this Act, the Commission may issue a new license to the existing licensee upon such terms and conditions, taking into account existing structure and facilities, as may be authorized or required under the then existing laws and regulations, or to another applicant under said terms and conditions. If the existing licensee applies for a new license, the Commission shall issue a new license to such

existing licensee unless the Commission determines that the plans of another applicant are better adapted to serve the public interest. If the existing licensee does not apply for a new license, the Commission shall issue a new license to the applicant the plans of which are best adapted to serve the public interest. In either case, the Commission shall not issue a license unless it is satisfied that (1) the applicant is able, ~~has been financially and technically~~, to carry out such plans and (2) the plans represent a cost effective approach to achieving the benefits to be derived therefrom.

"(b) The Commission shall make its determination of which plans are best adapted to serve the public interest on the basis of--

"(1) how each plan would develop, conserve, and utilize the water resources of the region in accordance with the provisions of section 10(a) of this Act;

"(2) the relative economic impact upon customers served by such applicant upon the failure of such applicant to receive the license, including an assessment of the economic impact upon the customers of an applicant that is the existing licensee that would result from the difference between the compensation to be paid under subsection (c) of this section and the cost of replacement power;

"(3) the economic impact, in the case of a non-utility license holder, upon the operation and efficiency of the dependent industrial facility or related activity, its existing employees, and the surrounding community, if the existing licensee fails to receive the new license;

"(3 4) the ability of each applicant to operate and maintain the project in a manner most likely to provide efficient, reliable electric service; and

"(4 5) the need of each applicant for the electricity generated by the project or projects to serve its existing customers including customers served by any electric utility which receives power from the existing licensee,";; and

~~"(5) the plans of each applicant to protect mitigate damage to, and enhance fish and wildlife affected by the project while assuring an adequate, efficient, economical, and reliable power supply.",~~

(b) by redesignating the remainder of subsection (a) as subsection (c);

(c) by striking "which license" and inserting in lieu thereof "A license issued under this section"; and

(d) by redesignating existing subsection (b) as subsection (d).

(e) by adding a new subsection:

"(e) A new license may only be issued for a period not to exceed thirty years unless the Commission determines that a longer period is necessary due to substantial new construction or significant redevelopment of the project in question. In no case shall a new license be issued for a period of more than fifty years."; and

(f) by adding a new subsection:

"(f) Notwithstanding any other provision of this section, for projects using tribal lands embraced within Indian reservations, the original license for which was issued prior to October 1, 1985 and for which a new license has not yet become effective by such date, the Commission shall not consider the factors set forth in Sections 15(b)(2) and 15(b)(4) in evaluating the plans of Indian tribes to which such lands belong that apply for a new license.".

Section 4 5. The amendments made by this Act shall not apply to any relicensing proceeding in which the Federal Energy Regulatory Commission has issued an order awarding a new license on or before July 31, 1985, regardless of whether such order is subject to judicial review, nor shall they operate to diminish the amount of the annual power charge to be paid pursuant to Sec. 10(e) of the Federal Power Act to Indian tribes for the use of their lands within Indian reservations.

Sec. 6. Section 30 of the Federal Power Act, as amended, is

further amended by striking subsection (b) and inserting in lieu thereof the following new subsection:

"(b) Exemptions granted under subsection (a) of this section shall be granted for a period not to exceed thirty years unless the Commission determines that a longer period is necessary due to substantial new construction or significant redevelopment of the project in question. In no case shall an exemption be granted for a period of more than fifty years. The Commission may not grant any such exemption to any facility the installed capacity of which exceeds 15 megawatts.".

Sec. 7. Section 405 of the Public Utility Regulatory Policies Act (16 U.S.C. 2705), as amended, is further amended in subsection (d) by inserting at the end thereof:

"Exemptions shall be granted for a period not to exceed thirty years unless the Commission determines that a longer period is necessary due to substantial new construction or significant redevelopment of the project in question. In no case shall an exemption be issued for a period of more than fifty years."

Sec. 8. Section 6 of the Federal Power Act, as amended, is further amended after "fifty years" by inserting "unless the Commission determines a shorter period is desirable.".

Sec. 9. The amendments made by sections 6 and 7 of this Act shall apply only to exemptions granted after the date of enactment of this Act.

Sec. 10. Section 3(17) of the Federal Power Act, as amended, is further amended --

(a) by adding a new paragrph (B) as follows:

"(B) Notwithstanding paragraph (A), no hydroelectric project shall be considered a small power production facility (other than for purposes of section 210(e) of the Public Utility Regulatory Policies Act) if such project impounds or diverts the water of a natural watercourse other than by means of an existing dam or diversion, unless:

"(i) Such project is located at a Government dam; or

"(ii) Such project meets terms and conditions set by fish and wildlife agencies under the same procedure as provided for under section 30(c) of the Federal Power Act.

"(iii) For the purposes of this paragraph, the term 'existing dam or diversion' means any dam or diversion that is part of a project for which a license has been issued on or before the enactment of this paragraph, or which the Commission determines does not require any construction or enlargement of impoundment structures (other than repairs or reconstruction) except for the addition of flashboards (or similar adjustable devices." and

(b) by redesignating the existing paragraphs.",

Sec. 11. Section 26 of the Federal Power Act, as amended, is further amended --

(a) by redesignating existing section 26 as "section 26(a)"; and

(b) by adding the following new subsections:

"(b) The Commission may --

"(1) after opportunity for a hearing on the record revoke for significant violation of its terms any permit, license, or exemption issued pursuant to this Part; and

"(2) issue such other orders as it deems necessary to ensure compliance with the provisions of this Part, or of any lawful regulation or order promulgated thereunder, of any permit, license, or exemption issued pursuant to this Part.

"(c) The Commission may institute proceedings in the district court of the United States in the district in which the project or part thereof is situated for the purpose of enforcing an order of the Commission under subsection (b) of this section. The court shall have the same powers as provided for under subsection (a) of this section.".

SEC. 12, SECTION 9 OF THE FEDERAL POWER ACT IS AMENDED BY:

(a) STRIKING FROM THE FEDERAL POWER ACT'S PRESENT SUBSECTION 9 (B) THE FOLLOWING LANGUAGE ". . .AND TO THE APPROPRIATION, DIVERSION, AND USE OF WATER FOR POWER PURPOSES. . ."

(b) BY ADDING THE FOLLOWING NEW SUBSECTION:

"(d) NOTWITHSTANDING ANY OTHER PROVISIONS OF LAW, THE COMMISSION SHALL NOT ISSUE AN ORIGINAL OR NEW LICENSE, AMENDMENT TO A LICENSE, OR EXEMPTION FROM LICENSING UNDER THIS PART, UNLESS THE APPLICANT PROVES AQUISITION, IN ACCORDANCE WITH SUBSTANTIVE AND PROCEDURAL PROVISIONS OF STATE LAW, OF THE NECESSARY RIGHTS ESTABLISHED PURSUANT TO STATE LAW TO APPROPRIATE, DIVERT, AND USE WATER."

SEC. 13. TO SECTION 21 ADD THE FOLLOWING NEW SENTENCE: "THE COMMISSION IS NOT EMPOWERED TO AUTHORIZE A LICENSEE TO EXERCISE THE POWER OF EMINENT DOMAIN PURSUANT TO THIS SECTION FOR THE PURPOSE OF ACQUIRING WATER RIGHTS."

SEC. 14. IN SECTION 27, DESIGNATE THE EXISTING SENTENCE AS SUBSECTION (a) AND ADD THE FOLLOWING ADDITIONAL SUBSECTIONS:

"(b) NOTHING IN THIS PART SHALL BE CONSTRUED AS CONFERRING UPON THE UNITED STATES, ITS AGENTS, PERMITTEES, OR LICENSEES ANY RIGHT TO ACQUIRE RIGHTS TO APPROPRIATE, DIVERT, OR USE WATER.

(c) APPROPRIATION OF WATER FOR POWER PURPOSES SUBJECT TO THIS PART SHALL BE PURSUANT TO SUBSTANTIVE AND PROCEDURAL PROVISIONS OF STATE STATUTORY LAW, DECISIONAL LAW, AND REGULATIONS GOVERNING THE APPROPRIATION, DIVERSION AND USE OF WATER, AND THE PAYMENT OF REQUISITE STATE FEES NEEDED TO EVALUATE THE APPROPRIATION.

(d) ESTABLISHMENT OF, AND COMPLIANCE WITH, PURSUANT STATE LAW, TERMS OR CONDITIONS, INCLUDING LICENSES, OR OTHER ENTITLEMENTS FOR APPROPRIATION, DIVERSION OR USE OF WATER SHALL NOT BE DEEMED TO CONSTITUTE A BURDEN ON INTERESTATE COMMERCE.

(e) NOTHING IN THIS PART SHALL ALTER IN ANY WAY ANY PROVISION OF STATE STATUTORY LAW, DECISIONAL LAW, OR REGULATION, OR OF ANY INTERSTATE COMPACT, GOVERNING THE APPROPRIATION, DIVERSION, OR USE OF WATER."

SEC. 15. TO SECTION 6 ADD THE FOLLOWING PROVISION AFTER THE SECOND SENTENCE: "THE COMMISSION IS NOT EMPOWERED TO IMPOSE ANY TERMS OR CONDITIONS IN ANY ORIGINAL OR NEW LICENSE OR AMENDMENT

TO LICENSE WHICH ARE INCONSISTENT WITH THE TERMS AND CONDITIONS ESTABLISHED PURSUANT TO STATE LAW IN ANY PERMIT, LICENSE, OR OTHER ENTITLEMENT FOR APPROPRIATION, DIVERSION, OR USE OF WATER FOR THE PROJECT AUTHORIZED BY THE LICENSE OR AMENDMENT."

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SENATE COMMITTEE ON
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September 19, 1986

The Honorable James McClure
Chairman
Senate Energy and Natural Resources Commitee
Room SD--358
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator McClure:

The state of Washington wishes to submit the enclosed written comments for the record of the oversight hearing held by the Senate Energy and Natural Resources Committee on September 12, 1986. The purpose of this hearing was to receive testimony regarding possible changes in the Federal Power Act to clarify the status of states' authorities over the development of hydroelectric generating projects.

Washington strongly urges that Congress amend the Federal Power Act to clearly require that hydropower proponents obtain all applicable state authorizations before becoming eligible to receive a federal license. State efforts to protect important public resources and to direct development to the most appropriate sites are frustrated by the assertion of the Federal Energy Regulatory Commission and project proponents that the Federal Power Act preempts states' authorities in this field. Despite adverse court interpretations, we believe it was never the intent of Congress to foreclose states from exercising their authorities in concert with FERC. Congressional action is needed to redress the current imbalance between federal and state authority over hydroelectric power development.

Thank you for the opportunity to provide comments on this important issue. Please let me know if the state of Washington can provide further assistance to the committee on this matter.

Sincerely,

Curtis Eschels

Curtis Eschels
Special Assistant for Policy

cc: Washington Congressional Delegation
The Honorable John Evans, Governor, State of Idaho
The Honorable Victor Atiyeh, Governor, State of Oregon
The Honorable Ted Schwinden, Governor, State of Montana
Craig Bell, Western States Water Council

TESTIMONY OF THE STATE OF WASHINGTON

on

CONSIDERATION OF APPLICABLE STATE WATER LAW DURING THE FEDERAL ENERGY REGULATORY COMMISSION'S LICENSING PROCEEDINGS

before the

Senate Committee on Energy and Natural Resources

Room SD-358

Dirksen Senate Office Building

Washington D.C., 20510

September 12, 1986

The State of Washington supports the position statement of the Western States Water Council concerning Federal Energy Regulatory Commission (FERC) hydroelectric power project licensing and state water rights, dated April 22, 1983 (enclosed) and the state of Montana's proposed amendments to the Senate Energy and Natural Resources Committee's "Joint Staff Compromise" amendments (enclosed). In addition, we urge the Committee to consider incorporating a prohibition against FERC licensing of any project that has not satisfied all applicable provisions of the laws of the state in which it would be located, and not just water rights.

It is the position of the State of Washington that the 1946 landmark case First Iowa Hydroelectric Cooperative v. Federal Power Commission (328 U.S. 152, 66 S. Ct. 906, 90 L.Ed 1146) was wrongly decided. The plain and clear meaning of section 9(b) of the Federal Power Act is that the states' authorities are not preempted. It is our belief that Congress intended that the states exercise their authority over hydroelectric development in concert with the Federal Power Commission, now FERC.

Unfortunately, First Iowa has been used since 1946 to frustrate states' efforts to carry out their responsibilities to protect the public interest within their own borders. The specter of preemption is raised whenever a state disagrees with FERC or attempts to place limits on a potentially damaging project. We believe the public and the environment suffer as a result.

It has become evident that FERC believes it has a mandate in its hydropower licensing to bring new projects on line regardless of the consequences. FERC's poor track record in protecting public resources and other aspects of the public interest is well documented in numerous successful legal challenges. We believe it

should be readily apparent that states are closer to the problems that hydropower development can bring, and are better positioned to fully recognize, assess and protect the public interest.

We question the considerable expenditure of federal funds necessary for FERC to oversee the approval and operation of small hydropower projects. These smaller projects do not raise any issues of national interest that can justify the heavy handed involvement of a highly centralized federal agency located thousands of miles from most of the projects it purports to regulate. We recommend that consideration be given to the development of criteria, to be included in the Federal Power Act, that would substantially reduce or eliminate FERC jurisdiction over such small projects where adequate state regulatory authority also exists.

The State of Washington also supports the concept of requiring that all FERC licensing decisions be consistent with state water resources plans, where they exist, including plans that determine areas suitable and not suitable for hydropower development. Such plans should not be made subject to FERC approval.

The State of Washington has worked very closely with the Northwest Power Planning Council since its inception in developing the Northwest Power Plan, the Columbia Basin Fish and Wildlife Program, and in currently ongoing studies to identify sites that are appropriate and inappropriate for hydroelectric development. FERC has given little deference to these efforts despite clear Congressional intent that it do so as provided in the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (P.L. 96-501). We therefore urge that the Congress strongly consider clarification of this requirement within the Federal Power Act.

Washington state rivers have been subjected to extensive hydroelectric development sponsored by utilities and the federal government since early in this century. Since the late 1970s, approximately eight hundred new hydropower projects (most small) have been proposed in Washington state. About two hundred of these are still being actively pursued. Only a few projects have actually been constructed and are in operation.

Washington, like Montana, Idaho, and a number of other states, has numerous examples of problems caused when the FERC licensing process preempts state authority.

Example 1 - In 1948, the City of Tacoma, WA. applied to the Federal Power Commission for a license to construct Mayfield and Mossyrock hydroelectric dams on the Cowlitz River, a river that supported regionally important runs of salmon and steelhead trout. These projects were strongly opposed by the Washington State Departments of Fisheries and Game because the dams would block the passage of large salmon and steelhead runs to many miles of habitat located above the dam sites. FERC issued the license in

1951 over these objections.

The license issuance was appealed by the state on the grounds that it conflicted with the state Columbia River Fish Sanctuary Act, passed by the state legislature in 1949, which prohibited dams of this size on the Cowlitz and other rivers tributary to the Columbia River. The Ninth Circuit Court of Appeals cited the First Iowa case in allowing the licensing decision to stand. Several years later, the Washington State Supreme Court ruled that an initiative approved by the citizens of the state which barred a city from obtaining or using a federal license to construct a dam did not apply to this federal license due to preemption. The dams were completed in 1963 and 1969.

This example illustrates how First Iowa-based preemption has been used to license and construct projects that were clearly not allowed under state law, would cause unacceptable destruction of public resources, and were demonstrably not in the public interest (opposed by a majority of the state's electorate).

Example 2 - The City of Seattle owns and operates three dams on the Skagit River. The largest, Ross Dam, was originally proposed for construction in four stages. The initial Federal Power Commission license was granted in 1927. Seattle obtained a state water right permit (allowing construction) in 1921 and a state reservoir permit in 1943 for the project. Another permit was issued in 1963 to cover additional instantaneous diversion amounts if the dam was raised to its ultimate planned height. Because of the planned phased development and numerous unanticipated delays, Seattle requested and received several extensions for completion of construction on its water right permits.

The raising of Ross Dam to its ultimate planned elevation became very controversial in the 1970's based on issues related to flooding of valuable recreation and timber land in the U.S. and Canada. In 1974, the state denied Seattle's request for another extension of time on its permits, arguing that Seattle had not pursued the projects with diligence. In FERC proceedings, the state opposed raising the dam on the grounds that it was not in the public interest and that the power was not needed. Over the objections of the state of Washington, FERC in 1977 approved the license to raise the dam.

The City of Seattle has since reached a negotiated settlement with Canada not to pursue this project, but this example illustrates how the FERC, in the absence of a state water right authorization and despite strong objections to the project as a matter of state policy, approved a project anyway based on the federal preemption of state authority. It also illustrates that a positive solution to a difficult problem was reached at the local level, outside the arcane workings of the FERC process.

Example 3 - A more recent example is that of South Fork Resources, Inc. v. Riniker. The project proponent is seeking to build a

hydroelectric project located, in part, in a Washington State park and diverting water past a waterfall valued for its aesthetic contributions to the park. The proponent filed a license application with FERC in July, 1982. In September, 1982, the proponent applied for a shoreline substantial development permit and three shoreline variance permits from King County. FERC granted the license in 1985. All of the shoreline variances were denied by either the state or the county. The state has oversight authority over local government decisions under the Shoreline Management Act (Chapter 90.58 RCW). The project proponents brought a lawsuit alleging that federal law preempts the application of state law to the project (First Iowa). The proponent argued that FERC has exclusive jurisdiction and that federal law preempts jurisdiction of the state Shoreline Management Act over the proposed project.

The federal district court did not rule on the issue of federal preemption of state authority. It ruled that because the proponent consistently expressed an intent to comply with all state and local laws in building and operating the project and that it fully intended to obtain all necessary state and local permits, the FERC license did not negate these local permitting requirements. South Fork Resources has now requested a declaratory ruling from FERC on whether its license contained a requirement to obtain state and local permits.

This case illustrates the need for clarification of the Federal Power Act that would require that a project developer obtain all applicable state authorizations (not only water rights) before a license is issued. Had the state and the proponent been able to negotiate differences without the specter of federal preemption, it is possible this matter could have been settled without resorting to expensive and counterproductive litigation.

Fortunately, there are also a number of positive examples in Washington in which project developers have worked diligently to assure that all state and local concerns were resolved before attempting to secure a FERC license. Generally, developers who have attempted to satisfy local and state requirements early in the process have found that federal licensing goes much more smoothly, because most or all issues have already been resolved. Projects that are likely to be unacceptable as proposed are identified and dropped or changed before a large amount of money is spent on feasibility studies. Most of the projects built in recent years or now under construction in Washington have followed this model of cooperation with state and local authorities. Most of the projects rejected by FERC or tied up in litigation have been proposed by those who have chosen to ignore state and local concerns.

Conclusion - In summary, the State of Washington urges that the Congress amend the Federal Power Act to require that FERC license a project only after all state authorizations related to hydropower development have been obtained by the proponent. This

should not be limited to water use authorizations, but needs to include all applicable provisions of the laws of the state in which a project would be located. We also urge that the Congress consider whether FERC jurisdiction is really necessary over small hydropower projects of no national significance.

Thank you for this opportunity to provide comments on this important issue. We offer any assistance you may require to help bring about these needed reforms.

POSITION
of the
WESTERN STATES WATER COUNCIL
concerning
AMENDMENT OF THE FEDERAL POWER ACT
Las Vegas, Nevada
April 16, 1982

WHEREAS, needless controversy has been caused by conflicts between the licensing procedures of the Federal Energy Regulatory Commission (FERC) and established principles of Western States water law; and

WHEREAS, FERC has been unwilling to modify its procedures to relieve these conflicts:

NOW, THEREFORE, BE IT RESOLVED by the Western States Water Council that the Federal Power Act (16 U.S.C. 791(a) et sec.) be amended as follows:

1. Strike from subsection 9(b) the following language "...and to the appropriation, diversion, and use of water for power purposes..." Add the following new subsection after subsection (c):
"(d) Notwithstanding any other provisions of law, the commission is prohibited from issuing an original or new license, amendment to license, or exemption from licensing under this Part, unless the applicant proves acquisition, in accordance with applicable substantive and procedural provisions of state law, of the necessary rights established pursuant to state law to appropriate, divert, and use water for power purposes."

2. To Section 21 add the following new sentence:

"The commission is not empowered to authorize a licensee to exercise the right of eminent domain pursuant to this section for the purpose of acquiring water rights."

3. In Section 27 designate the existing sentence as subsection (a) and add the following additional subsections.

"(b) Nothing in this Part shall be construed as conferring upon the United States, its agents, permittees, or licensees any right to acquire rights to appropriate, divert, or use water.

(c) Appropriation of water for power purposes subject to this Part shall be pursuant to substantive and procedural provisions of State statutory law, decisional law, and regulations governing appropriation, diversion and use of water.

(d) Establishment of, and compliance with, pursuant to State law, terms or conditions, including licenses, or other entitlements for appropriation, diversion or use of water for power purposes, shall not be deemed to constitute a burden on interstate commerce.

(e) Nothing in this Part shall alter in any way any provision of State statutory law, decisional law, or regulation, or of any interstate compact, governing the appropriation, diversion, or use of water."

To Section 6 add the following provision after the second sentence:

"The commission is not empowered to impose any terms or conditions in any original or new license or amendment to license which are inconsistent with the terms and conditions established pursuant to State law in any permit, license, or other entitlement for appropriation, diversion, or use of water for the project authorized by the license or amendment."

MONTANA'S FEDERAL POWER ACT AMENDMENTS

MONTANA'S PROPOSED AMENDMENTS TO THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE'S "JOINT STAFF COMPROMISE" AMENDMENTS IN THE NATURE OF A SUBSTITUTE FOR THE WALLOP-JOHNSTON SUBSTITUTE

NOVEMBER 1, 1985

(The following is the proposed Joint Staff Compromise. Montana's amendments to the compromise are presented in FULL CAPS.)

Strike everything after the enacting clause and insert the following:

That this Act may be referred to as the "Electric Consumers Protection Act of 1985."

Sec. 2. Sec. 7(a) of the Federal Power Act (16 U.S.C. 800(a)) as amended, is further amended--

(a) by inserting "original" after "hereunder or"; and

(b) by striking "and in issuing licenses to new licensees under section 13 hereof".

Sec. 3. Section 10 of the Federal Power Act, as amended is further amended--

(a) after "water-power development," by inserting "for the adequate protection, mitigation, and enhancement of fish and wildlife,";

(b) after "including", by inserting "irrigation, flood control, water supply and";

(c) by AMENDING SUBSECTION (a) TO READ:

"(a) CONFORMANCE WITH STATE WATER LAW

THAT THE LICENSEE HAS ACQUIRED, IN ACCORDANCE WITH THE SUBSTANTIVE AND PROCEDURAL PROVISIONS OF STATE LAW, THE NECESSARY RIGHTS ESTABLISHED PURSUANT TO STATE LAW TO APPROPRIATE, DIVERT AND USE WATER.",

BY redesigning existing subsection (a) as paragraph (ab)(1) and by inserting the following new paragraphs:

"(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (ab)(1), the Commission shall consider:

"(A) the extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing or conserving a waterway or waterways arfected by the project that is prepared by--

"(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; and

"(ii) the State in which the facility is or will be located; and

"(B) the recommendations of Federal and State agencies exercising administration over WATER MANAGEMENT, FACILITY SITING, fish and wildlife, flood control, navigation, irrigation, recreation and cultural resources of the State in which the project is located, and the recommendations of Indian tribes affected by the project;

"(3)(A) Upon receipt of an application for a license, the Commission shall solicit recommendations for proposed terms and conditions to be included in the license from the STATE AND FEDERAL agencies and Indian tribes identified in paragraph (a)(2) of his section.

"(B) If any recommendation for a proposed term or condition is received by the Commission at least 30 days prior to issuing any licenses under this section, the Commission shall explain in ITS ORDER ISSUING ITS LICENSE ~~WRITING~~ its reason for rejecting or modifying any such proposed term or condition.",

Sec. ~~3~~ 4. Section 15 of the Federal Power Act (16 U.S.C. 808), as amended, is further amended--

(a) by striking subsection (a) through "terms and conditions to a new licensee," and inserting in lieu thereof "Sec. 15 (a). If the United States does not, at the expiration of the existing license, exercise its right to take over, maintain and operate any project or projects of the licensee, as provided in section 14 of this Act, the Commission may issue a new license to the existing licensee upon such terms and conditions, taking into account existing structure and facilities, as may be authorized or required under the then existing laws and regulations, or to another applicant under said terms and conditions. If the existing licensee applies for a new license, the Commission shall issue a new license to such

existing licensee unless the Commission determines that the plans of another applicant are better adapted to serve the public interest. If the existing licensee does not apply for a new license, the Commission shall issue a new license to the applicant the plans of which are best adapted to serve the public interest. In either case, the Commission shall not issue a license unless it is satisfied that (1) the applicant is able, ~~been financially and technically~~, to carry out such plans and (2) the plans represent a cost effective approach to achieving the benefits to be derived therefrom.

"(b) The Commission shall make its determination of which plans are best adapted to serve the public interest on the basis of--

"(1) how each plan would develop, conserve, and utilize the water resources of the region in accordance with the provisions of section 10(a) of this Act;

"(2) the relative economic impact upon customers served by such applicant upon the failure of such applicant to receive the license, including an assessment of the economic impact upon the customers of an applicant that is the existing licensee that would result from the difference between the compensation to be paid under subsection (c) of this section and the cost of replacement power;

"(3) the economic impact, in the case of a non-utility license holder, upon the operation and efficiency of the dependent industrial facility or related activity, its existing employees, and the surrounding community, if the existing licensee fails to receive the new license;

"(3 4) the ability of each applicant to operate and maintain the project in a manner most likely to provide efficient, reliable electric service; and

"(4 5) the need of each applicant for the electricity generated by the project or projects to serve its existing customers including customers served by any electric utility which receives power from the existing licensee."; and

~~"(5) the plans of each applicant to protect mitigate damage to, and enhance fish and wildlife affected by the project while assuring an adequate, efficient, economical, and reliable power supply."~~;

(b) by redesignating the remainder of subsection (a) as subsection (c);

(c) by striking "which license" and inserting in lieu thereof "A license issued under this section"; and

(d) by redesignating existing subsection (b) as subsection (d)~~,~~;

(e) by adding a new subsection:

"(e) A new license may only be issued for a period not to exceed thirty years unless the Commission determines that a longer period is necessary due to substantial new construction or significant redevelopment of the project in question. In no case shall a new license be issued for a period of more than fifty years."' and

(f) by adding a new subsection:

"(f) Notwithstanding any other provision of this section, for projects using tribal lands embraced within Indian reservations, the original license for which was issued prior to October 1, 1985 and for which a new license has not yet become effective by such date, the Commission shall not consider the factors set forth in Sections 15(b)(2) and 15(b)(4) in evaluating the plans of Indian tribes to which such lands belong that apply for a new license.".

Section 4 5. The amendments made by this Act shall not apply to any relicensing proceeding in which the Federal Energy Regulatory Commission has issued an order awarding a new license on or before July 31, 1985, regardless of whether such order is subject to judicial review, nor shall they operate to diminish the amount of the annual power charge to be paid pursuant to Sec. 10(e) of the Federal Power Act to Indian tribes for the use of their lands within Indian reservations.

Sec. 6. Section 30 of the Federal Power Act, as amended, is

further amended by striking subsection (b) and inserting in lieu thereof the following new subsection:

"(b) Exemptions granted under subsection (a) of this section shall be granted for a period not to exceed thirty years unless the Commission determines that a longer period is necessary due to substantial new construction or significant redevelopment of the project in question. In no case shall an exemption be granted for a period of more than fifty years. The Commission may not grant any such exemption to any facility the installed capacity of which exceeds 15 megawatts.".

Sec. 7. Section 405 of the Public Utility Regulatory Policies Act (16 U.S.C. 2705), as amended, is further amended in subsection (d) by inserting at the end thereof:

"Exemptions shall be granted for a period not to exceed thirty years unless the Commission determines that a longer period is necessary due to substantial new construction or significant redevelopment of the project in question. In no case shall an exemption be issued for a period of more than fifty years."

Sec. 8. Section 6 of the Federal Power Act, as amended, is further amended after "fifty years" by inserting "unless the Commission determines a shorter period is desirable.".

Sec. 9. The amendments made by sections 6 and 7 of this Act shall apply only to exemptions granted after the date of enactment of this Act.

Sec. 10. Section 3(17) of the Federal Power Act, as amended, is further amended --

(a) by adding a new paragrph (B) as follows:

"(B) Notwithstanding paragraph (A), no hydroelectric project shall be considered a small power production facility (other than for purposes of section 210(e) of the Public Utility Regulatory Policies Act) if such project impounds or diverts the water of a natural watercourse other than by means of an existing dam or diversion, unless:

"(i) Such project is located at a Government dam; or

"(ii) Such project meets terms and conditions set by fish and wildlife agencies under the same procedure as provided for under section 30(c) of the Federal Power Act.

"(iii) For the purposes of this paragraph, the term 'existing dam or diversion' means any dam or diversion that is part of a project for which a license has been issued on or before the enactment of this paragraph, or which the Commission determines does not require any construction or enlargement of impoundment structures (other than repairs or reconstruction) except for the addition of flashboards (or similar adjustable devices." and

(b) by redesignating the existing paragraphs.".

Sec. 11. Section 26 of the Federal Power Act, as amended, is further amended --

(a) by redesignating existing section 26 as "section 26(a)"; and

(b) by adding the following new subsections;

"(b) The Commission may --

"(1) after opportunity for a hearing on the record revoke for significant violation of its terms any permit, license, or exemption issued pursuant to this Part; and

"(2) issue such other orders as it deems necessary to ensure compliance with the provisions of this Part, or of any lawful regulation or order promulgated therunder, of any permit, license, or exemption issued pursuant to this Part.

"(c) The Commission may institute proceedings in the district court of the United States in the district in which the project or part thereof is situated for the purpose of enforcing an order of the Commission under subsection (b) of this section. The court shall have the same powers as provided for under subsection (a) of this section.".

SEC. 12, SECTION 9 OF THE FEDERAL POWER ACT IS AMENDED BY:

(a) STRIKING FROM THE FEDERAL POWER ACT'S PRESENT SUBSECTION 9 (B) THE FOLLOWING LANGUAGE ". . .AND TO THE APPROPRIATION, DIVERSION, AND USE OF WATER FOR POWER PURPOSES. . ."

(b) BY ADDING THE FOLLOWING NEW SUBSECTION:

"(d) NOTWITHSTANDING ANY OTHER PROVISIONS OF LAW, THE COMMISSION SHALL NOT ISSUE AN ORIGINAL OR NEW LICENSE, AMENDMENT TO A LICENSE, OR EXEMPTION FROM LICENSING UNDER THIS PART, UNLESS THE APPLICANT PROVES AQUISITION, IN ACCORDANCE WITH SUBSTANTIVE AND PROCEDURAL PROVISIONS OF STATE LAW, OF THE NECESSARY RIGHTS ESTABLISHED PURSUANT TO STATE LAW TO APPROPRIATE, DIVERT, AND USE WATER."

SEC. 13. TO SECTION 21 ADD THE POLLOWING NEW SENTENCE: "THE COMMISSION IS NOT EMPOWERED TO AUTHORIZE A LICENSEE TO EXERCISE THE POWER OF EMINENT DOMAIN PURSUANT TO THIS SECTION FOR THE PURPOSE OF ACQUIRING WATER RIGHTS."

SEC. 14. IN SECTION 27, DESIGNATE THE EXISTING SENTENCE AS SUBSECTION (a) AND ADD THE FOLLOWING ADDITIONAL SUBSECTIONS:

"(b) NOTHING IN THIS PART SHALL BE CONSTRUED AS CONFERRING UPON THE UNITED STATES, ITS AGENTS, PERMITTEES, OR LICENSEES ANY RIGHT TO ACQUIRE RIGHTS TO APPROPRIATE, DIVERT, OR USE WATER.

(c) APPROPRIATION OF WATER FOR POWER PURPOSES SUBJECT TO THIS PART SHALL BE PURSUANT TO SUBSTANTIVE AND PROCEDURAL PROVISIONS OF STATE STATUTORY LAW, DECISIONAL LAW, AND REGULATIONS GOVERNING THE APPROPRIATION, DIVERSION AND USE OF WATER, AND THE PAYMENT OF REQUISITE STATE FEES NEEDED TO EVALUATE THE APPROPRIATION.

(d) ESTABLISHMENT OF, AND COMPLIANCE WITH, PURSUANT STATE LAW, TERMS OR CONDITIONS, INCLUDING LICENSES, OR OTHER ENTITLEMENTS FOR APPROPRIATION, DIVERSION OR USE OF WATER SHALL NOT BE DEEMED TO CONSTITUTE A BURDEN ON INTERESTATE COMMERCE.

(e) NOTHING IN THIS PART SHALL ALTER IN ANY WAY ANY PROVISION OF STATE STATUTORY LAW, DECISIONAL LAW, OR REGULATION, OR OF ANY INTERSTATE COMPACT, GOVERNING THE APPROPRIATION, DIVERSION, OR USE OF WATER."

SEC. 15. TO SECTION 6 ADD THE FOLLOWING PROVISION AFTER THE SECOND SENTENCE: "THE COMMISSION IS NOT EMPOWERED TO IMPOSE ANY TERMS OR CONDITIONS IN ANY ORIGINAL OR NEW LICENSE OR AMENDMENT

TO LICENSE WHICH ARE INCONSISTENT WITH THE TERMS AND CONDITIONS ESTABLISHED PURSUANT TO STATE LAW IN ANY PERMIT, LICENSE, OR OTHER ENTITLEMENT FOR APPROPRIATION, DIVERSION, OR USE OF WATER FOR THE PROJECT AUTHORIZED BY THE LICENSE OR AMENDMENT."